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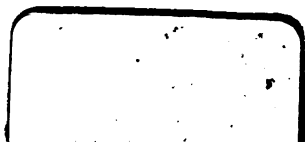
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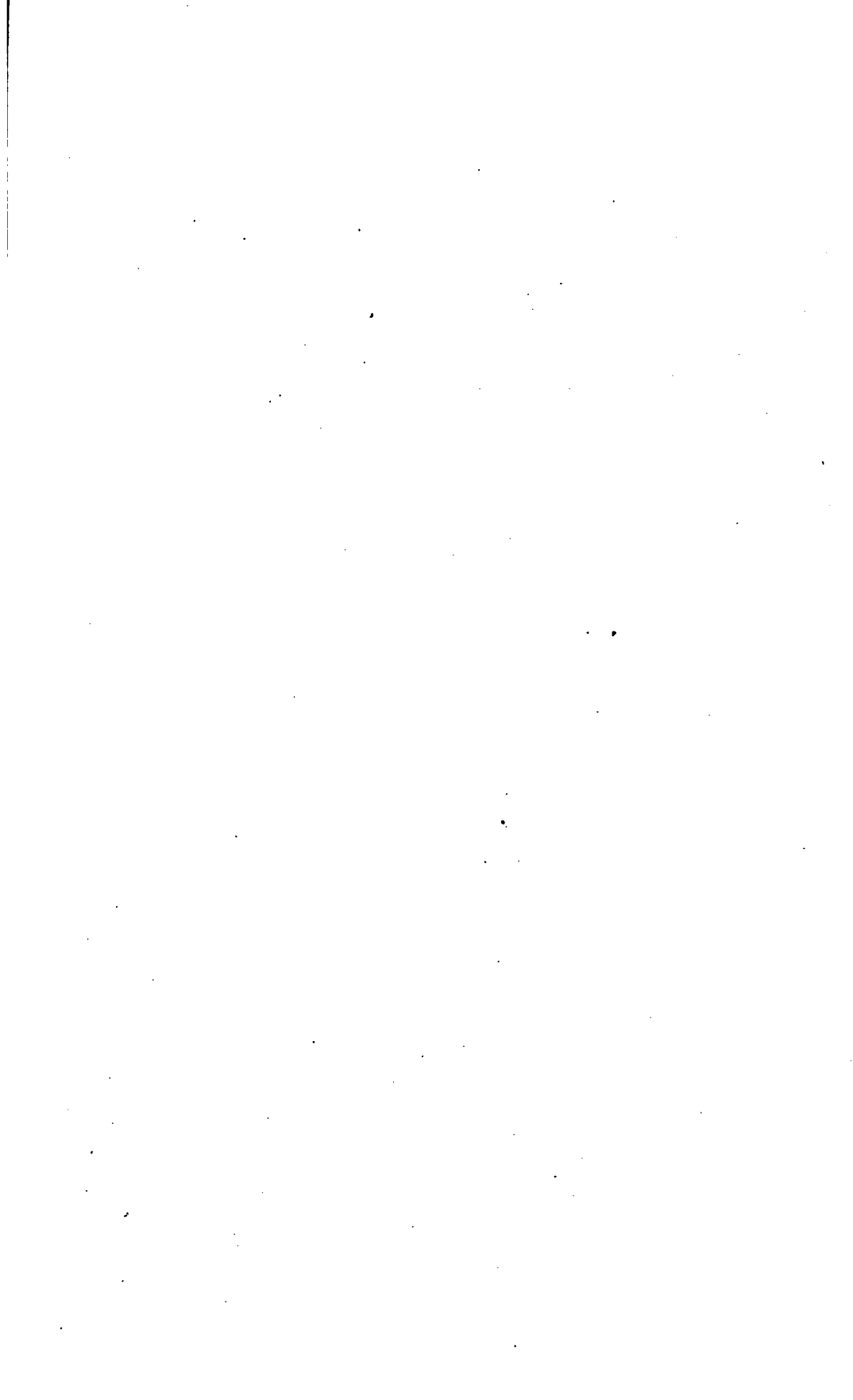
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ELEMENTS
OF
CONVEYANCING
IN
THEORY AND PRACTICE;
WITH
CURSORY REMARKS
UPON THE STUDY OF THAT SCIENCE;
AND
OBSERVATIONS AND DIRECTIONS
RELATIVE TO THE
PRACTICE OF CONVEYANCING.

THE SECOND EDITION,
CAREFULLY REVISED AND CORRECTED, WITH GREAT ADDITIONS AND
IMPROVEMENTS.

By **CHARLES BARTON, Esq**
OF THE INNER TEMPLE, BARRISTER AT LAW.

VOL. IV.

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ELEMENTS
OF
CONVEYANCING.

BOOK III.

**OF THE MEANS OF TRANSFERRING REAL
PROPERTY FROM ONE PERSON
TO ANOTHER.**

PART I.

OF ORIGINAL CONVEYANCES.

CHAP. I.

**OF CONTRACTS OR AGREEMENTS, CONSIDERED AS PRE-
LIMINARY TO A MORE FORMAL ASSURANCE.**

A DEED is defined to be "a writing on paper or **CONTRACTS,**
parchment, sealed and delivered, to prove the agree- **&c.**
ment of the parties whose deed it is, to the things con-
tained therein^a." As it appears by this definition, that a
deed is the evidence of some prior agreement between the
parties; and as the stability of the deed must conse-
quently depend in a great measure upon the validity of
the contract upon which it is founded, it will be proper,
before we enter upon the immediate subject of deeds, to
make some preliminary inquiries concerning the essential
properties to a lawful contract, agreement or obligation.
In doing which, I shall consider,

^a See Term. de Leg. Co. Lit. 35, b.

CONTRACTS,
&c.

- I. WHO ARE LEGALLY CAPABLE OF ENTERING INTO A CONTRACT.
- II. WITH OR TO WHOM A CONTRACT OR CONVEYANCE MAY BE ENTERED INTO OR MADE.
- III. WHAT MAY BE THE SUBJECT OF A LAWFUL CONTRACT.
- IV. OF THE CONSIDERATION NECESSARY TO SUPPORT A CONTRACT.
- V. OF THE REQUISITES TO A VALID CONTRACT IN RESPECT OF OUTWARD CIRCUMSTANCES.

I. WHO ARE LEGALLY CAPABLE OF ENTERING INTO A CONTRACT.

Who are capable of entering into a contract.

As to which, it may be observed generally, that all persons whomsoever are able to enter into an efficient agreement concerning their property, whether real or personal, unless prohibited by some physical incapacity, or some positive rule of law. These physical imbecilities arise from the nature of a contract, which being founded upon an active assent of the mind to the thing agreed upon, it is essential that the parties contracting should be capacitated to give that free and absolute assent to the terms of stipulation which natural justice requires should be given to every contract intended to be binding upon the parties and their representatives (1); it becomes necessary, therefore, to inquire who are, and who are not, deemed in the eye of the law capable of giving such assent; and also what circumstances have been holden to be a sufficient indication of it. Consent is an act of reason, accompanied by deliberation, and supposes, in the words of *Barbeyrac* ^b,

^b Grot. l. 2, c. 11, s. 5.

(1) *In omnibus rebus quæ dominium transferunt concurrat oportet affectus ex utraque parte contrahentium; nam sive ex venditio sive donatio sive conductio sive qualibet alia causa contrahendi fuit, nisi animus utriusque consensit, perducere ad effectum id quod inchoatur non potest.*

first, *Un pouvoir physique de consentir*; secondly, *Un pouvoir morale*; thirdly, *Un usage bien sérieux et parfaitement libre de ses deux sortes de pouvoirs*^c. That is, a physical power of consenting, a moral power, and a deliberate and free use of those powers. Persons wanting either of these requisites, either actually, or in consideration of law, are consequently incapable of entering into any efficient agreement. Under this description of disability, evidently come idiots, lunatics, and infants, as being all of them more or less destitute of deliberation and reflection (1). Whence it follows, that all contracts entered into by such persons during their state of mental debility, are utterly void; and it was the same of the Roman law (2). But as, with respect to lunatics, it is possible that an appearance of insanity may be assumed for the purposes of fraud, the policy of the law will not permit a *non compos* to take advantage of his own incapacity, by pleading, on the return of his reason, his previous disability (3); but still the law being as anxious to protect real imbecility, as to discourage

^c Puff. l. Nat. & Gent. lib. 3, c. 6.

(1) *Furiosus nullum negotium gerere potest quia non intelligit quod agit. Infans et quia infantia proximus est non multum a furioso distant.* Inst. Lit. 3, T. 20, s. 8.

(2) It was formerly much agitated in the courts whether deeds, and other solemn instruments of idiots, &c. were actually void *ab initio*, or only voidable; but the cases in which it has been holden that the deeds of such persons are not absolutely void, but only voidable, appear to proceed upon the notion that *non est factum* cannot be pleaded to them, because as they have the form, (though not the operation) of deeds, they cannot be avoided without showing the special matter; but the better opinion seems to be, that as such an imbecility goes to the gist of the action, and proves the contract a nullity, it may be taken advantage of on the general issue. See 1 Pow. Contr. 11; 1 Fonb. Tr. Eq. 47, n. (d); but see also, *Yates v Bowen*, Stra. 1104.

(3) The old cases relative to this point are contradictory, but the position here advanced seems to be most conformable to the better opinion. See the contrary authorities on this subject, and the reasons on which they are founded, collected and observed upon, 1 Pow. Contr. 14.

CONTRACTS,
 &c.

fraud and dissimulation, it has been holden, on the construction of the statute *de prerogative regis*⁴, that if the idiot be really found to be such, by inquisition of office, on the writs *de idioto*, or *lunatico inquirendo*, any contracts or alienation he may have improvidently entered into to his prejudice during the period of his imbecility, may be avoided on a *scire facias* by the king, who is bound, as *pater patriæ*, to protect his subjects in the due enjoyment of their rights and property⁵. And, if the *non compos* continues so for life, his acts are avoidable by his heir, or other representatives; for it would be highly unreasonable, that the representatives should be bound by the acts of an ancestor who was incapable of knowing what he did⁶.

This liability of contracts to be avoided, on account of the imbecility of the mind of the contracting party, does not, however, it is to be observed, extend to acts done in a court of record, as fines, recoveries (and uses declared of them, which are a part of the assurance) recognizances, and the like, which neither the parties nor their representatives are permitted to avoid. The reason of which is, "not that the law binds such persons, for therein *jura naturæ sunt immutabilia* still, but clean contrary, because the law finds them persons not so disabled, nor admits the averment of such disablement, because it is certified by the invincible and indisputable credit of the Judge, that they were perfect and able persons: and so here is a law of policy that doth not cancel the law of nature, but doth only bound it in point of form and circumstance⁷." For which reason, married women are not permitted to avoid a fine, &c. though their acts, like those of idiots, are in general (as will be seen hereafter), either absolutely void or avoid-

⁴ 17 Ed. 2, c. 9 and 10.

⁵ See *Beverley's case*, 4 Co. 123, b; *Attorney General v. Parkhurst*, 1 Chan. Ca. 112; Tr. Eq. b. 1, c. 2, s. 1; and see Fonb. Eq. 48, notes.

⁶ Co. Lit. 247.

⁷ Per Hobart, Ch. Just. in *Needler v. Bishop of Winchester*, Hob. Rep. 220; and see 1 Fonb. Eq. 85, n. (d).

able. The rule of law, in these cases, being *fieri non debet, sed factum valet*; and *Mansfield's* case^b, furnishes a striking instance of the extreme anxiety of courts of law to protect the authority of their records; for though the fine was levied by a man obviously an idiot, and by a most gross contrivance; and though Lord Dyer observed, that the Judge who had taken it ought never to take another, yet he allowed it to prevail. As, by the common law, a fine might be avoided, on account of fraud, or even on account of infancy, by inspection, during the infancy¹, it seems remarkable, that idiocy or lunacy should not have been held entitled to the same effect; but *Mansfield's* case abundantly proves, that the grossest imbecility of mind was not, at law, a ground of annulling the record. But in equity, the remainder-man was relieved against a fine levied by an idiot, even against a purchaser^k. The Court of Chancery, however, in the case of fraud, does not absolutely set aside or vacate the fine; but considering those who have taken it under such circumstances as trustees, decrees a re-conveyance of the estate to the persons prejudiced by the fraud; and though this does not distinctly appear to be the practice, in the case of fines levied by idiots or lunatics, yet, from the argument in *Day v. Hungat*¹, such may be inferred to be the rule of proceeding^m; and in equity the maxim of law relative to the invalidity of the acts of idiots, &c. was always understood, of acts done by the lunatic in prejudice of others, that he should not be admitted to excuse himself on pretence of lunacy; but not as to acts done by him in prejudice of himself, for this can have no foundation in reason and natural justiceⁿ.

And the 15 Geo. 3, c. 30, enacts, that the marriage of a

^b 12 Co. 123.

see also *Addison v. Mascall*,
² Vern. 678.

¹ Bracton, 436, b. 437, a;
Co. Lit. 380, b.

¹ 1 Roll. Rep. 115.

^m See Fonb. Eq. 47, n.

^k *Rushloy v. Mansfield*,^(k)
Tothill's Transactions, 42;

ⁿ Tr. Eq. b. 1, c. 2, s. 2.

CONTRACTS,
 &c.

person duly found a lunatic, shall be null and void, unless he be previously declared sane by the Lord Chancellor, or his trustees.

But by 4 Geo. 2, c. 10, lunatics being trustees or mortgagees, are empowered by themselves, or by their committees, to convey the estates of which they are seised in trust or mortgage; it seems, however, doubtful whether the words of the act include all lunatics, as well such as are at large, as those of whom custody has been granted under the great seal^o.

With respect to who shall be deemed an idiot, *non compos*, or lunatic, Sir William Blackstone^p, describes an idiot to be one that has no understanding from his nativity; and a lunatic, one that has had understanding, but who has by some accident lost the use of his reason; or, more properly, one that has lucid intervals, sometimes enjoying his senses, and sometimes not; but under the general name of *non compos mentis* (which Sir E. Coke says, is the most legal name), are included not only idiots and lunatics, but persons under phrenzies, or who have lost their intellects by disease: or such, in short, as the Court of Chancery have judged to be incapable of conducting their own affairs^q (1).

It is not, therefore, the person's being of a weak understanding alone, or the foolishness of the bargain, that is

^o See *Ex parte Marchioness of Annandale*, Ambler's Rep. 80.

^p 1 Black. Com. 302.
^q Ibid. 304.

(1) This passage, however, which seems to imply an exclusive jurisdiction in the Court of Chancery to decide upon lunacy, is accurate, the rules of judging upon the point of insanity being the same both at law and in equity, and the Court of Chancery cannot exercise any discretion upon the subject. See *Osmond v. Fitzroy*, 3 P. Wms. 130; *Reinnet v. Vade*, 2 Atk. 327; *Ex parte Barnesley*, 3 Atk. 168; *Donegue's case*, 2 Ves. 407; and the valuable notes to Tr. Eq. b. 1, c. 2, s. 3.

sufficient to invalidate the contract. For, *per* Holt, Justice, in *Bath and Montague's case*¹, the courts would have enough to do, if they were to examine into the wisdom or prudence of men in disposing of their estates; be a man, therefore, wise or unwise, if he be legally *compos mentis*, he is the disposer of his own property; and *stet pro ratione voluntas*². But although there be no direct proof that a man is *non compos*, or delirious, yet if he be of a weak understanding, and is harassed and uneasy at the time, or if the deed be executed in *extremis*; or by a paralytic; it cannot be supposed he had a mind adequate to the business he was about, and might more easily be imposed upon³; especially if the provision in the deed be something extraordinary, or the conveyance without any consideration⁴. But in truth, with respect to who shall be deemed an idiot or *non compos*, and who not, no certain rule can be laid down, but it must be left to the wisdom and discretion of those whom the law has entrusted with the trial of it⁵. "There is, indeed, an infinite, nay, almost insurmountable difficulty, in laying down abstract propositions upon a subject, which depends upon such a variety of circumstances, as the legal competency of the mind to the act in which it is engaged, if its competency be impeached by positive evidence of an anterior derangement, or affected by circumstances of bodily debility, sufficiently strong to lead to a suspicion of intellectual incapacity. General rules are easily framed. The difficulty arises on the application of them: for few are sufficiently comprehensive to embrace every circumstance which may enter into and materially affect the particular case. There can be no difficulty in saying, that if a mind be possessed of itself, at the period

¹ 3 Chan. Ca. 28.² See also Treat. Eq. b. 1, c. 2, s. 3.³ *Filmer v. Gott*, 7 Bro. P. C. 70; *Fane v. Duke of Devonshire*, 2 Bro. P. C. 77.⁴ *Clarkson v. Hamoay*, 2 P. Wms. 203; *Bridgeman v. Green*, 2 Ves. 627; *Bennet v. Vade*, 2 Atk. 324.⁵ Treat. Eq. b. 2, c. 2, s. 3.

CONTRACTS,
 &c.

of time when such mind acted, it ought to act efficiently. This rule, however, goes very little way ; for it is extremely difficult to lay down, with tolerable precision, the rules by which such state of mind can be tried : but the course of procedure, for such purpose, allows of rules. If derangement be alleged, it is clearly incumbent on the party alleging it to prove such derangement. If such derangement be proved, or be admitted to have existed, at any particular period, but a lucid interval be alleged to have prevailed at the period particularly referred to, then the burthen of proof attaches on the party alleging such lucid interval, who must show sanity and competence at the period when the act was done, and to which the lucid interval refers. And it certainly is of equal importance, that the evidence in support of the allegation of a lucid interval, after derangement at any period has been established, should be as strong, and as demonstrative of such fact, as where the object of the proof is to establish derangement. The evidence in such case applying to stated intervals, ought to go to the state and habit of the person, and not to the accidental interview of any individual, or to the degree of self-possession in any particular act ; for, from an act, with reference to certain circumstances, and which does not of itself mark the restoration of that mind, which is in general deemed necessary to the disposition and management of affairs, it were extremely dangerous to draw a conclusion so general, as that the party, who had confessedly before laboured under a mental derangement, was capable of doing acts binding on himself and others.”

Nor is inebriety, though in truth a temporary insanity, deemed a sufficient ground to vacate a deed or agreement entered into under that influence ; for this were to encourage drunkenness, which is itself an offence, and is of the

” *Per Lord Chancellor v. Panther*, 3 Br. Cha. Ca. Thurlow, in *Attorney General* 441.

person's own seeking; if, however, such inebriety were induced by the fraud and contrivance of the other party, and the person be so excessively drunk that he is utterly deprived of the use of his understanding, the court of equity will in some cases relieve him against a contract so entered into, for he cannot be considered as having given his serious and deliberate assent, without which no contract can be binding ^x.

CONTRACTS,
&c.

An infant (or person under the age of twenty-one years), is likewise incapable of binding himself to contract to alienate by deed any part of his property, he being in the eye of the law equally deficient in the necessary capacity to assent to any alienation, as an idiot or lunatic; and though it has been endeavoured to distinguish between such deeds as give an authority only; and such as convey an interest; the first being absolutely void, and the other voidable only, yet the better opinion seems to be, that there is the same reason to make them both void, unless indeed, in the single case of a feoffment, which is holden to be voidable only, by reason of the solemnity of the conveyance ^y (1).

Incapacity of
infants to con-
tract.

But although conveyances *in pais*, by an infant, are uniformly void, yet conveyances by act of law are void or

^x See *Osmond v. Fitzroy*, 3 P. Wms. 126; *Johnson v. Medlicote*, 3 P. Wms. 130, n. (a); *Cory v. Cory*, 1 Ves. 19; also Tr. Eq. b. 1, c. 2, s. 3. ^y Perk. s. 12; see 1 Pow. Contr. 32; Cro. Car. 502; 1 Fonb. Eq. b. 1, c. 2, s. 4, and notes there.

(1) But see *Zouch v. Parsons*, 3 Bur. 1801, where the Court of King's Bench appears to have adopted the distinction taken by Perkins, that such deeds only of an infant are *void* as do not take effect by *delivery*, whilst those which do so take effect are only *voidable*; upon which distinction Lord Mansfield observes, that *letters of attorney*, and other deeds which delegate a mere power without conveying an interest, are included in the first species of deeds, and consequently void. And see Co. Lit. 51, b. n. (3).

CONTRACTS.
See

not according to their tendency, for the disability of an infant (analogous to that of a *non compos*), to assent to an act in *pais* operates solely in discharge of himself, that he may not be over-reached by the cunning of others.

The validity of acts of law by infants depends, therefore, upon whether they appear upon the face of the transaction to be beneficial or prejudicial to the infant; if prejudicial they will be absolutely void; but if beneficial, they will be voidable or not at the infant's election. Thus, for instance, although the surrender of an infant lessee by deed will be void, yet his surrender in law, by acceptance of a new lease, will be void or not according to the terms of such lease. If it increase his interest, or decrease his rent, it will be good, but if it do neither, or the reverse of these, it will be void². And upon this principle it is, that a bond with a *penalty*, given by an infant, although for necessities, will be void³, for it never can be for his benefit to enter into a penalty⁴. And so in all other cases, where an agreement with an infant be without an appearance of benefit to him, it will be void (1)⁵.

² Cro. Car. 502.

³ Co. Lit. 172, a.

⁴ *Williams v. Williams*, 1 Bro. Cha. Ca. 152.

⁵ See 1 Roll. Ab. 727, pl. 8;

Moor, 679; *Agcliffe v. Archdale*, Cro. Eliz. 620; *Manning v. Volnap*, Ib. 700; and see 1 Fonb. Eq. 77, n. (a).

(1) Hence it is prudent for the trustees of infants, where any doubts can reasonably be entertained, whether a measure proposed to be adopted relative to the property of their *cestui que trust* be beneficial or not, to apply to the Court of Chancery, and act under its direction. See *Hallett v. James*, and *Hulverton v. Harrison*, cited 1 Fonb. Eq. 79, n.; also *Cecil v. Salisbury*, 2 Vern. 224.

But though the acts of infants are voidable at their election, they may be validated by the infant's assent, when of full age, whether express, as by an avowed confirmation; or implied, as by receiving interest on a contract after majority; *Franklin v. Thornbury*, 1 Vern. 132; continuing in possession after age, of lands taken in exchange,

2 Ibid.

But as this rule of law, if too rigidly pursued, would prejudice those very interests which it was established to protect, an exception has been admitted in all cases where the observance of it would counteract its object, *cessante enim ratio, cessat et ipsa lex*; and therefore, an infant is bound even at law by contracts for his diet, lodging, apparel, necessary learning, and the like, suitable to his degree and quality^d (1). So if an infant take a lease of an house or of land, and reside in the house, or enter upon the land and manure it until a rent day; if the rent be not of greater value than the lease, he will be liable to an action of debt for the rent^e. And it was said by Yates, Justice, that an action of assumpsit for a fine, due by an infant on an admittance to a copyhold, would lie, if the infant continued to occupy and enjoy^f. And as necessaries for an infant's wife are necessaries for him, he is chargeable for them, unless provided before the marriage, in which case, though she use them after the marriage, he is not chargeable^g.

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&c.

Exceptions to
infants inca-
pable to bind
themselves.

Lest, however, this purpose should be diverted from its legitimate end, the law is careful not to suffer it to be extended beyond the necessity which gives use to it. And therefore, though an infant will, at law, be bound by contracts for necessaries, he will not be bound by those he may enter into for the payment of money borrowed for the purpose of paying for such necessaries; "for he may mis-

^d Co. Lit. 172; Cro. Jac. *ton v. Elliot*, 2 Bulst. 69.

494, 560; 1 Lev. 86; 1 Durn. ^f 3 Bur. 1719.

& East, 41.

^g *Turner v. Trisby*, 1 Stra.

^e See Cro. Jac. 320; Kir- 168.

2 Ibid. 225; 1 Eq. Ca. Ab. 282, pl. 2; accepting a marriage portion after the death of the husband, 2 Ves. 526; and see cases cited, 1 Pow. Contr. 56, 58; and 1 Fonb. Eq. 85, n. (d).

(1) Which shall be tried by the judges, and not by a jury. *Mackarell v. Bachelor*, Cro. Eliz. 583.

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&c.

apply the money, and convert it to some other use;" and therefore the law trusts him only at the peril of the lender, who must either lay it out for him, or see that it is properly applied^b. In equity, however, if the money lent for the payment of necessities be actually so expended, it will be considered as a valid debt, and the infant compellable to repay the money borrowed^c.

And the Court of Chancery, which in all cases acts upon principles of substantial justice and natural equity, (and to whom the custody of infants officially belongs) in many other cases interposes, and holds infants to their contracts, when the law, from the preceding principles, would annul them; because if no agreement with infants, unless for actual necessities, were in any case to be binding, they would, whilst protected from disadvantageous bargains, be prevented from the benefit of such as might be beneficial to them; for who would treat with those who were not bound by their contracts? that court, therefore, very properly considers the intrinsic nature of the contract, the circumstances under which it was entered into, and the pernicious or beneficial effects it is calculated to produce to the infant, and vacates or establishes it accordingly^d. Thus a contract made by an infant, by the advice and consent of his friends, has been decreed to be good, and that under the most harsh circumstances imaginable; (namely, by turning the interest of money into principal), upon condition that the creditor would not, at that time, extend the lands of the debtor^e.

Marriage articles by infants.

Upon these considerations arises the refusal of the Court of Chancery to rescind agreements entered into by female

^b *Earle v. Peale*, 1 Salk. 387; *Darby v. Boucher*, 1 Salk. 279; *Barlow v. Grant*, 1 Vern. 255. *Philips v. Paget*, 2 Atk. 80. ^c 9 Mod. 104; *Holt v. Clarenceur*, Stra. 937.

^d *Earl of Chesterfield v. Marlow v. Pitfield*, 1 P. Wms. 559; *Harris v. Lee*, Ibid. 483; and see *Davis v. Austen*, 3 Br. Cha. Ca. 179; *Lady Cromwell*, 1 Eq. Ca. Ab. 287, pl. 1; and see 1 Fonb. Eq. 80, n. (b).

infants upon their marriage; for as females are with great propriety, frequently induced to marry before they attain the age of twenty-one years, it is fit that they should be enabled to make a settlement of their property, as a provision for the issue of the marriage, or to protect it from being dissipated by the extravagance of a husband. It is also to be recollected, that marriage agreements entered into for the settlement of the property of the parties, are not original, but in the nature of accessary contracts. "The principal contract is the marriage itself, which male infants at fourteen, and female infants at twelve, are deemed of capacity to enter into with the consent of their parents or guardians. As soon, therefore, as the marriage is had, the principal contract is executed, and cannot be rescinded even at law; so that it is then considered on the same footing as contracts binding on the ground of necessity; the estate and capacity of the parties are immediately altered; the children born of the marriage are equally purchasers under both father and mother, so that were the parties permitted to rescind such contracts, the interest of third persons (*i. e.* the issue) would be affected by it. Then, as the law has entrusted the parents and guardians of infants with the direction of the principal contract, (*i. e.* the marriage of their children or wards), and considers the children when acting under that sanction, as bound by their assent, it seems perfectly consistent with the principles of equity, that they should be bound, acting under the same sanction, by their assent to the accessary contract respecting their property". And, indeed, if such agreements were not to be binding upon the infant, this privilege of not being generally bound to the execution of contracts, benignly provided by the law for his advantage, would in all cases, where the property of a female infant consisted in money, operate the other way; for the primary contract of marriage being binding, it must necessarily be followed by its legal consequences, one of which would evidently be to

^m See Cases cited 1 Pow. Contr. 44.

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 &c.

If, therefore, according to Hardwicke, a female infant, on a marriage with the consent of her guardians, covenant, in consideration of an adequate settlement, to convey her inheritance to her husband, she will be bound by her contract in equity, although not at law^c. Thurlow, Chancellor, however, in *Durnford v. Lane*^d, refused decreeing a specific performance of the marriage articles in such a case, declaring his dissent from the doctrine laid down by Lord Hardwicke, and that she ought not to be bound, unless upon the husband's death she accepted of the provision made by the settlement: and he adhered to the same opinion in a subsequent case^e.

And whether the estates of the infant be in possession, or be *choses* in action, or depend upon a contingency, they will be equally bound^f.

A woman infant may also, by an agreement entered into on her marriage, waive her right of dower and thirds, incident by law, to the act of marriage^g.

Exceptions to
the validity of
marriage arti-
cles by infants.

But these positions respecting the obligation of infants to perform contracts entered into by them in contemplation of marriage, must not be admitted without some distinctions; for, if by reason of any collusion, the provision made for the wife, be inadequate to her settled fortune, and any part of it consist of *choses* in action, or other personal interests not reduced into possession during the marriage, courts of equity will not permit her assent to the agree-

^a *Harvey v. Ashley*, 3 Atk. 617.

^c *Cannell v. Buckle*, 2 P. Wms. 243; *Harvey v. Ashley*, 3 Atk. 617.

^d 1 Bro. Rep. 106.

^e *Clough v. Clough*, 4 Bro. 510; and see 3 Wooddes. 453, n.; (And see 3 Atk. 613, 1 Bro. 111, as to her personalty.)

^f *Theobald v. Duffay*, 9 Mod. 101; 1 P. Wms. 574; *Price v. Seys*, Barnard. 117; *Blois v. Hereford*, 2 Vern. 501; 1 Fonb. Eq. 73, n. (y).

^g See *Drury v. Drury*, 5 Bro. Par. Cases, 570; *Vizard v. Longdale*, 1 Vern. 55; *Jordan v. Savage*, 2 Eq. Ca. Abr. 101.

ment to deprive her of the legal interest she may have in them by surviving her husband¹. And so too, it should seem, that the preceding observation upon this head, must be confined to the personal property of the infant; as it appears to be doubtful how far a female infant will be bound by agreements entered into during her minority respecting her real estate². It appears at least to be amongst other things essential to the binding her real estate, that the settlement be made before marriage³; that the uses of it be fair and reasonable⁴; and that there be issue of the marriage⁵.

And with respect to *male* infants, the rule is still more prescribed. For it has never been determined, that a male infant can, except in the case of a power⁶, do any act to bind his real estate; yet, where a male infant married an adult, who, by settlement upon the marriage, covenanted that her estate should be settled to certain uses, he was held bound by her covenant⁷. For, *per* Thurlow, Chancellor, if a woman, before marriage, conveys her property, and agrees to settle her general expectations, when they fall in, without any fraud, upon the intended husband, such agreement must be executed, and the husband, when of age, must answer her contract: and he intimated, that although the covenant of the husband was not in itself binding upon her, yet it served to show his concurrence, and to take away any imputation of fraud upon him.

¹ See *Williams v. Williams*, 1 Bro. Cha. Ca. 153; and cases cited 1 Pow. Contr. 47.

² *Durnford v. Lane*, 1 Bro. Cha. Ca. 116; *Caruthers v. Caruthers*, 4 Bro. Ch. Cases, 504; *Cannell v. Buckle*, 2 P. Wms. 243; and the cases collected there, n. (2); and in 1 Fonb. Eq. 67, n. (y); and 1 Pow. Contr. 48; Co. Lit. 52, a. n. (2).

³ *Lucy v. Moor*, 3 Bro. P. C. 514; *Seamer v. Bingham*, 3 Atk. 56.

⁴ *Williams v. Williams*, 1 Bro. Cha. Ca. 153.

⁵ *Harvey v. Ashley*, 3 Atk. 617.

⁶ *Hottingshead v. Hottingshead*, cited 2 P. Wms. 72, 78, 229; 1 Str. 604.

⁷ *Stoccombe v. Glubb*, 2 Bro. Rep. Cha. 545.

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We have observed, that the law of England, whilst it protects the imbecility of infants, still keeps in view that respect which is due to the fair claims and interests of others, and will not allow that which, in the emphatical language of Lord Mansfield, was intended as a shield, and not as a sword, to be turned into an offensive weapon of fraud and injustice; therefore, an infant, conusant of a fraud, shall be as much bound as an adult^c. This rule, however, must, it should seem, be confined to such acts as were only voidable; for it has been held, that a warrant of attorney; given by an infant, being absolutely void, the court could not confirm it; though the infant appeared to have given it, knowing that it was not valid, and for the purpose of collusion^d.

And by 7 Anne, c. 19, infants, trustees, or mortgagees, are not only enabled to convey the estates held in trust or mortgage, but are compellable to do so by the Court of Chancery or Exchequer; such conveyance being as operative in all respects as if the infants were of full age; which power has been construed to authorize them to convey by common recovery^e: and if the infant trustee be also a feme-covert, the court may direct her to convey by fine^f; but the infant must be an express and purely a trustee, and the trust in writing, and not a merely constructive trust^g. And the infant being compellable under those acts to convey, he may convey voluntarily and the conveyance will be operative notwithstanding his infancy^h, it being a general rule in equity, for the prevention of delay and expense,

^c *Evroy v. Nicholas*, 2 Eq. 559; *Ex parte Smith*, Ambl. Ca. Abr. 489; *Savage v. Foster*, 9 Mod. 38; *Watts v. Cresswell*, M. 1 G. 1; 9 Vin. Abr. 415; *Beckett v. Cordley*, 1 Bro. Rep. Cha. 353.

^d *Sanderson v. Marr*, 1 H. Black. 75; and see *Jevon v. Bush*, 1 Vern. 342.

^e *Ex parte Johnson*, 3 Atk.

^f *Ex parte Maire*, 3 Atk. 479; Com. Rep. 615.

^g *Ex parte Vernon*, 2 P. Wms. 549; *Godwyn v. Lester*, 3 P. Wms. 387; *Hawkins v. Obeen*, 2 Ves. 559.

^h See *Zouch v. Parsons*, 3 Burr. 1794. *sed quare*.

that whatever a person may be compelled to do by suit, he may do without suit. And by 29 Geo. 2, c. 31, infants may surrender leases in the Court of Chancery, in order to renew the same. An infant may also present to a vacant benefice, of which he is patron¹; because a presentation is not a thing of profit, of which a guardian can make any benefit^k (1).

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&c.

These several instances of infants being allowed to act, clearly fall within the rule laid down by Lord Mansfield, in the case of *Zouch v. Parsons*, that the acts of an infant, which do not touch his interest, but take effect from an authority which he is trusted to execute, are binding. It remains, however, to observe, that, in the case of *Hollingshead v. Hollingshead*¹, tenant in tail, empowered to make a jointure, so as such jointure did not exceed a moiety of the estate, was held to have executed the power by a covenant, during his infancy, with his wife's relations, that he would, within six months after he came of age, settle so much of the land as should amount to 100*l.* per annum, upon his then intended wife for life. This covenant clearly affected his interest, yet it was held binding, perhaps, from the nature of the power, which, being to settle lands in jointure, implied the right of executing it during infancy; for, as he might contract marriage during infancy, to which dower was incidental, if he had not been allowed to execute

¹ Co. Lit. 89, a. 172, a.

¹ Cited in 2 P. Wms. 229,

^k *Hearle v. Greenbank*, 3 Atk. 710.

and in Stra. 604.

(1) But Mr. Hargrave, in his edition of Coke upon Littleton, note 1, p. 89, a. very properly observes, that though the decision of Lord King, in the case of *Arthington v. Coverley*, 2 Eq. Ca. Ab. 518, "may remove all doubts about the legal right of an infant of the most tender age to present, still it remains to be seen, whether the want of discretion would induce a court of equity to control the exercise, where a presentation is obtained from an infant, without the concurrence of the guardian."

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 &c.

the power, by making the jointure in lieu of dower previous to the marriage, the power afterwards might have been a mere nullity^m.

Also, where an estate, given to an infant upon a condition; such acts as an infant can perform, must be done by him; and infancy, in such a case, is no excuseⁿ.

But Lord Coke^o takes a distinction between conditions in fact, which are expressed, as to pay money, or to do or not to do some particular act, and conditions in law, which are implied; and these are distinguishable into conditions by the common law, and by statute: conditions by the common law, he observes, are of two sorts, one founded on skill and confidence, the other not; and conditions by statute are also of two qualities, *scil.* when the statute for execution of the condition in law gives recovery, and when the statute gives an entry and no recovery. As to the condition in law, founded on skill and confidence, as a stewardship in fee, if the condition be broken, the infant is barred for ever; not so where the condition in law is not founded on skill and confidence, as where the infant or feme covert be lessee for life, and makes a feoffment in fee, and the lessor enters for the forfeiture; yet it shall not bar the infant or feme covert, after the death of her husband. But if an infant or feme covert commit waste, it shall bind the infant and feme covert, for the statute gives the action to recover the land; but if the condition be by force of a statute, which gives an entry, but no action, as in case of an alienation in mortmain, the infant or feme covert is not barred by the entry for the condition broken^p.

Infants are also forbidden by positive law^q, to enter

^m Fonb. Eq. 82, n. (c). 333, 343; *Scott v. Haughton*,

ⁿ *Whittingham's case*, 8 2 Vern. 560.

Rep. 44, b; 3 Bulst. 59; ^o 8 Rep. 44.

Williams v. Fry, 2 Lev. 21; ^p See also Co. Lit. 233, b.

1 Ventr. 199; 1 Cha. Ca. 138; ^q 17 Geo. 3, c. 26; and

Falkland v. Bertie, 2 Vern. see subsequent act.

into any contract for the purchase of an annuity; and consequently any assurance executed by him, as evidence or in confirmation or execution of such contract, would be nugatory.

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A feme covert, though of full age, is also incapable of binding herself or husband by any agreement *in pais*, not only because she is, in contemplation of law, under the dominion and coercion of her husband, and consequently has no moral capacity to assent to any contract respecting either his property or her own¹, but because, as the law has vested the property of the wife in her husband, she would, if allowed to bind herself, be liable to engagements without any means of answering them, and if allowed to bind her husband, she might, by the abuse of such power, involve his family in ruin². Hence it is a general rule, that all deeds executed by a married woman (except only the Queen consort) for the purpose of conveying her estate, are absolutely void, and not voidable only.

Disability of
 femes covert.

What has been before observed, therefore, in respect of money borrowed by infants for necessities, even though actually applied for such purpose, is equally true at law, in respect of femes covert; and the same distinction also prevails in equity with respect to cases where the money borrowed was, and where it was not, so applied³.

But in cases where no injury can arise to the husband, the acts of the wife will be good; therefore a wife may, without her husband, execute a naked authority, whether given before or after marriage⁴. So, though an interest, as well as an authority, pass to the wife, yet if the authority

What acts of
 feme covert
 good.

¹ 1 Pow. Contr. 59; Salk. cases cited 1 Pow. Contr. 387; *Harris v. Lee*, 1 P. 59, and 1 Fonb. Eq. 90; n. Wms. 483. (h).

² See 1 Fonb. Eq. 84, n. (h). ³ *Godolphin v. Godolphin*, 1 Ves. 21; *Peacock v. Monk*,

⁴ Prec. Cha. 502; *Harris v. Lee*, 1 P. Wms. 483; and 2 Ib. 191; Co. Lit. 112, a, n. (6).

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be collateral to, and do not flow from the interest, it may be executed by the wife alone, the interest and the authority being in such case as distinct as if they were vested in different persons^x. And as a feme covert may, without her husband, convey lands, in mere execution of a power or authority, so may she, with equal effect, in performance of a condition; as, where land is vested in her on condition to convey to others^y. And these acts she may do, upon the ground already stated, that her husband cannot be prejudiced by such acts, and prejudice might arise to others, if his concurrence should be essential. It seems doubtful, however, whether she can convey lands, which she holds as trustee, without her husband joining in the conveyance^z. For "trusts being properly the subjects of consideration for courts of equity only, and though, in them, the legal estate is made subservient to the trust, yet courts of law take notice of the trusts for very few purposes; nor will it be easy to find an authority for departing from any rule about the effect of legal conveyances, merely in respect of their being a performance of trusts^a." Another reason for this distinction may be drawn from the consideration, that if a married woman were allowed to convey a trust estate, without her husband's concurrence, she might convey it before the several objects of the trust were satisfied, for which he might jointly with her be responsible to the *cestui que trust*: a reason, which does not apply to the mere execution of a power, or performance of a condition^b. And as this latter reason extends to the case of a feme covert named executrix, it has been said, that she cannot, without the assent of her husband, take upon

^x *Gibbons v. Moulton*, ^z *Daniel v. Ubley*, Sir Finch Rep. 346; and see *Wm. Jones*, 138.

Goodill v. Bingham, 1 Bos. & Bul. 192.

^a *Co. Lit.* i 12, a, n. (6.)

^b 1 *Fonb. Eq.* 90, n. (h).

^y *Sir Wm. Jones*, 137, 138.

herself the execution of the will^c. But as to this, it is observable, that, in the spiritual court, she certainly might prove the will, and do all other acts respecting it, without the concurrence of her husband; and there is no instance of a prohibition being in such case granted, to restrain the proceedings of the spiritual court^d. She cannot, however, it seems, release her testator's debts, even though the husband do assent to her acting as executrix; for, "if the wife's gift or release should stand good, her act might exceedingly endanger the husband, and make his goods liable to the creditors, if the testator's estate be wasted by the gifts or releases of the wife^e."

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There is also, with respect to *femes covert*, a further distinction in equity, by which a wife is allowed, in certain cases, to have property separate from and independent of her husband, in respect of which, contracts entered into by her will be equally binding as if she were sole^f (1). And her acquiescence in a court of equity, on a bill filed for that purpose, to any disposition of such property, will operate as an appointment of it^g.

So the general engagement of a wife will, in equity, operate upon her separate personal property, and apply to the

^c Wentworth's Office of and see acc. *Russell's case*, Executor, 202, cites 2 H. 7, 5 Co. 27.

15.

^f *Grigby v. Cox*, 1 Ves. 517.

^d Fonb. Eq. 90, n. (h).

^e *Allen v. Papworth*, 1 Ves.

^g Wentw. Executor, 206; 163.

(1) And in these cases it does not seem to be necessary that her trustees should be parties to the contract, unless their assent be expressly required by the settlement, the mere appointment of trustees not being a sufficient ground from whence to infer that such was the intention of the parties, as there must have been trustees in order to secure her the separate property. Still, however, it seems prudent to obtain their concurrence, if it can be had, as their approbation will induce a court of equity to view the transaction, if contrary to the intent of the settlement, with a more favourable eye. 1 Pow. Contr. 60.

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rents and profits of her real estate; and her trustees will be obliged to apply both, when they arise, to the satisfaction of such general engagement^b. And an agreement entered into by a feme covert with her husband, in respect to such separate property, or a conveyance to him, has been held to be valid^c. Though in later cases this doctrine has been questioned^d.

And a covenant in articles entered into before marriage, that she shall have the disposition of it such real and personal property as may accrue to her during her coverture, will enable her to dispose of it without fine, whether the estate be equitable or legal^e. This, however, was doubted by Hardwicke, Chancellor, who seems to have thought, that the power of a feme covert over her separate estate, must be confined to such part of it as was personal, for that of her real estate she could make no disposition during her coverture, unless by fine, or unless she had before marriage reserved such power to herself, by way of trust, or of a power over an use^f. In *Wright v. Cadogan*^g, however, an heir at law, on appeal to the House of Lords, was adjudged to execute a conveyance to the party in whose favour such agreement was made^h (1).

And in the case of *Compton v. Collinson*ⁱ, the power of a feme covert over her separate property seems to have

^b *Peacock v. Monk*, 2 Ves. 193; *Norton v. Tarvill*, 2 P. Wms. 144; *Standford v. Marshall*, 2 Atk. 68; *Hulme v. Tenant and Wife*, 1 Brow. Cha. Ca. 16.

^c *Freeman v. Mason*, 2 Eq. Ca. Abr. 26, pl. 26; Bunb. 205; 2 Brow. P. Ca. 378.

^d See *Milnes v. Rusk*, 2

Ves. jun. 498; and *Whistler v. Newman*, 4 Ib. 129.

^e *Wright v. Lord Cadogan*, 6 Brow. P. Ca. 156.

^f *Peacock v. Monk*, 2 Ves. 191.

^g 6 Brow. P. Ca. 156.

^h *Doe v. Staple*, 2 Term Rep. 684; and see *Rippon v. Dawding*, Amb. 565.

ⁱ 1 H. Blac. Rep. 334.

(1) And a feme covert, like an infant, may by assent after coverture determined, make prior agreements valid which would otherwise be voidable. See 2 Vern. 225; Cowp. 201; Dougl. 53.

been carried to a still greater extent than had hitherto been allowed, for in that case, a wife living apart from her husband, was permitted to surrender a copyhold estate, settled to her separate use, without the concurrence of her husband, he having, upon the separation, covenanted to join in all necessary conveyances to such uses as she should appoint. CONTRACTS,
&c.

There are also some cases, where a feme covert may even at law be bound by her separate contracts; as, where the husband has abjured the realm^a, or been banished^c, or be married to an alien enemy^d, or be attainted of felony^e; but the reason of this is, that he is in these cases considered as *civiliter mortuus* (or dead to the community), and therefore deemed to be a feme, and no longer under the control of her husband; or be the wife of a citizen of London^f: and according to some^g, she is bound by her separate contract, after divorce *a mensa et thoro*; but in Rolle^h, it is expressly said, that though husband and wife be divorced *a mensa et thoro*, the husband may release a legacy left to his wife, such divorce, even for adultery, not dissolving the marriageⁱ.

It was also for some time considered as a doctrine fully established by some modern cases^j, that a feme covert, living apart from her husband, on a separate maintenance allowed her by her husband, was bound by her own contracts, and that the husband was discharged; but this doctrine has since been solemnly denied to be law^k.

^a 1 Roll. Rep. 408; Co. Lit. 132, b. Cro. Eliz. 908. Also 1 Pow. Contr. 75, &c.; 1 Fonb. Eq.

^c 2 Vern. 104; Co. Lit. 133, a. 103, n. (r); Co. Lit. 303, n. (1).

^d 1 Salk. 116; 1 Lord Raym. 147.

^e *Newsom v. Bowyer*, 3 P. Wms. 37; Co. Lit. 42, b.

^f 10 Mod. 6.

^g Moor, 666; and 9 Mod. 3.

^h 1 Abr. 343, pl. 8.

ⁱ And see acc. 2 Ib. 301, pl. 12; and *Stephens v. Potty*,

^j See *Ringstead v. Lanesborough*, and *Barwell v. Brooks*, cited 1 Durnf. & East, 6. Also *Corbett v. Poelnitz*, reported Ibid.

^k See *Marshall v. Rutton*, 8 Term Rep. 545; and see 1 Pow. Contr. 80; 1 Fonb. Eq. 106, n. (o).

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An agreement entered into by a feme covert, jointly with her husband, will, however, it seems, if for the benefit of her estate, be binding upon her, notwithstanding her coverture^c.

So, though there must, generally speaking, be two persons at least reciprocally assenting, in order to constitute an effective agreement, and husband and wife are considered at law as but one person, and therefore under a moral incapacity of entering into any valid agreement with each other; yet such agreement will in equity be valid, and though made without consideration, will be binding, not only against the husband himself, and his representatives, but all others, except creditors, unless he parts with the whole of his estate to her^d (1). And the savings of the wife arising out of any separate maintenance she may have under such agreement, will be at her separate disposal, and if parted with to the husband, by way of loan, she will be considered as a creditor to that amount against him and his representatives^e (2).

^c *Rothwell v. Widdrington*, *Chancey*, cited 1 Cha. Ca. 118; 1 Ves. 539; *Beard v.*

^d *Beard v. Beard*, 3 Atk. *Nuthall*, 1 Vern. 427; *Cecil v. Juxton*, 1 Atk. 278; *Offley*

^e See *Stanning v. Style*, *v. Offley*, Prec. Cha. 26.
3 P. Wms. 335; *Georges v.*

(1) See *Pawlett v. Delaval*, 2 Ves. 666; *Stanning v. Style*, 3 P. Wms. 334; *Calmady v. Calmady*, cited 3 P. Wms. 339; *Attorney General v. Whorewood*, 1 Ves. 538; *sed vide Milnes v. Buck*, 2 Ves. jun. 498. But in this case Loughborough, Chan. is reported to have expressed a doubt, whether a feme covert ought to be considered as a feme sole, *quoad* her husband, with respect to her separate property arising from an agreement between them, to the extent to which it had in some cases been carried.

(2) But it is to be observed, that if the wife do not demand the produce of the estate assigned to her by her husband, but he continues wholly to support her as if no separate property had been settled upon her, the courts will not suffer an account of such separate property to be carried

Other persons who are disabled to convey, are, persons **CONTRACTS, &c.** attainted of treason, felony, or præmunire; upon which their estates immediately vest in the crown or the lord, by way of forfeiture or escheat, as a punishment for the breach of their allegiance; but these incapacities have been already noticed.

Lastly, tenant in tail will be bound by an agreement respecting his intailed estate ^f.

Having in the preceding pages considered, with as much succinctness as the subject appeared to admit of, who are, and who are not, by reason of their mental capacity, allowed to bind themselves by agreement, I shall proceed to consider who, by reason of the quantity or duration of interest which subsists in them, are capable of binding others, as well as themselves, by such stipulation.

In all cases where the party has an absolute interest in the thing concerning which the agreement is made, it will be binding not only upon himself, but also upon all other persons subsequently deriving title from or through him, unless it was confined personally to the party himself^g. And also will it bind those who hold the land, &c. in trust for him. Hence the agreement of the *cestui que trust* of an estate, will conclude his trustees, although no parties to it ^h.

Where a bill was filed for a specific performance of an agreement for a sale of a copyhold (and that to the exclu-

^f *Ross v. Ross*, 1 Cha. Ca. 171.

^h *Cornbury v. Middleton*, 1 Cha. Ca. 173, 208.

^g *Cro. Eliz.* 553 ^h *Dy.* 14, pl. 69.

carried back beyond the end of the current year, to be computed from the last day appointed for the payment of it. See *Powell v. Hankey*, 2 P. Wms. 82, and the cases there cited. But otherwise, if the agreement be kept alive by her regularly demanding an account, &c. *Warwick v. Edwards*, 1 Eq. Ca. Abr. 140, pl. 7; *Ridout v. Lewis*, 1 Atk. 269.

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sion of the widow's free-bench) by a father to his son for valuable consideration, paid as to the greatest part, the father dying before an actual surrender, Lord Hardwicke was of opinion, that, by analogy to the determinations at law in similar cases, where the husband had actually parted with the estate, in which cases the widow lost her free-bench, upon the ground that the freebench estate of the wife was but a branch out of the estate of the husband, the wife should, in equity, where there was an agreement, be bound thereby; for it was, in equity, a parting with the whole estate: then that court, considering the thing as done from the time at which it ought to be done, considered the vendor as a trustee for the vendee, and that those who came in his place ought to perform his agreement. And his Lordship decreed a specific execution against the widow¹; and he expressed his disapprobation of a prior case^j, where a contrary decision was made.

Also, a corporation being considered as one body, will be bound by the agreement of its head. But this obligation will be upon the members in their corporate, and not in their individual capacities^k. And though the corporation be dissolved, or changed, yet shall it be bound to perform its covenants^l. And churchwardens, being a corporation, and morally competent to assent to a reasonable agreement, beneficial to the parish, may therefore bind, as well the parishioners and their successors, as the succeeding churchwardens^m.

And the agreement of the ancestor will bind the heir,

¹ *Hinton v. Hinton*, 2 Ves. 631, 638; and see *Rennington v. Cole*, Noy, 29; *Benson v. Scot*, Salk. 185; Freem. 516.

^j *Musgrove v. Dashwood*, 2 Vern. 45, 60.

^k 1 Vent. 357; *sed vide*, as to the latter point, 2 Vern.

396. The authority of this case, however, appears to be doubtful. And see *Edwards v. Brown*, 1 Lev. 237.

^l *Owen*, 73; 2 And. 107.

^m See *Martin v. Nutkin*, 2 P. Wms. 266; 2 Bq. Ca. Abr. 23, pl. 22.

whether it be in respect of freehold lands^a, or copyholds^c, or borough English^b; where the youngest son, as customary heir, will be bound by his ancestor's agreements. And though the ancestor be only tenant for life, yet if the agreement were evidently advantageous to the heir, at the time it was concluded, it will bind him^d. CONTRACTS,
&c.

A mother may, also, acting as administratrix to her husband, bind her children^e.

And it is now holden, that the covenants or agreements of a woman before marriage, will bind an after-taken husband^f (1). "For a man who marries without treaty must be content to take his wife as he finds her^g."

^a *Baden v. Pembroke*, 2 Vern. 213. ^c *Neighter v. Sturman*, 1 Vern. 210.

^b *Greenwood v. Hare*, 1 Cha. Rep. 144. ^d *Baskerville v. Baskerville*, 2 Vern. 448.

^e *Per Hardw. Prec. Ch.* 640. ^f *Strathmore v. Bowes*, 2 Brow. Cha. Rep. 345; and

^g *Chetwynd v. Fleetwood*, see 10 Mod. 160, 243.
⁴ Bro. Par. Ca. 435.

(1) Where a widow woman, previously to a second marriage, assigns over her estate to trustees, for the children by her first husband, there appears to be no reason to contest the validity of such settlement. *Hunt v. Matthews*, 1 Vern. 408; *King v. Cotton*, 2 P. Wms. 358, 674; *Newstead v. Searle*, 1 Atk. 265; *Doe v. Routledge*, Cowp. 705; *Ex parte Marsh*, 1 Atk. 158. But where such settlement has been made for the benefit of herself alone, without the husband's privity, it was formerly held to be void, as against the husband, as being in derogation of the rights of marriage; *Howard v. Hooker*, 2 Cha. Rep. 42; *Carlton v. Dormett*, 2 Vern. 17; *Draper's case*, 2 Freem. 29; *Gilb. Lex Prætor*. 267; *Poulson v. Wellington*, 2 P. Wms. 535. The above cited case, however, of *Strathmore v. Bowes*, appears to have very much shaken those authorities, as it has a direct and immediate tendency to establish the doctrine that a woman may, previously to and in contemplation of her marriage, so convey her property to trustees for her own use, as to be entirely beyond the reach of her intended husband.

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etc.

But as it is a maxim of law, that the real estate of the wife shall not be bound without a fine or recovery^a; no agreement of the husband alone will bind the wife^w, unless the wife, upon a private examination, assent to such agreement (1); or unless she reserve to herself, before marriage, a power of disposing of her real estate without fine, which she may do either by conveying it in trust, or by reserving a power over an use^x. And, indeed, some doubt may reasonably be entertained whether the consent of the wife, upon private examination alone, will be sufficient to induce the court to decree a performance of an agreement of the husband to convey the wife's real estate; for though it is so stated in a book of some authority^y; and though the courts of equity will take such consent of a feme covert, where her assent is required to the investment of money in the purchase of land, of which she will be tenant in tail^z, yet there does not appear to be any case in which a feme covert has been permitted in equity to convey an estate of freehold, (unless a trust estate), by any other means than those required by law^a. And if a feme covert agree to sell her inheritance, upon condition that she is to have part of the money, and it is accordingly vested in the hands of trustees, no after-agreement of her's will make it liable to the husband's contracts^b.

^a 2 Co. 74, 78; 10 Ibid.^y Treat. Eq. 34.

43.

^z *Oldham v. Hughes*, 2^w *Bryan v. Wolley*, 4 Vin.

Atk. 453.

Abr. 57, pl. 19.

^a And see *Portington's*^x See Co. Lit. 326, b. n.;

case, 10 Co. 42, b.

Wright v. Cadogan, 6 Bro.^b *Rutland v. Mollineaux*,Par. Ca. 156; *Doe v. Staple*,

2 Vern. 64.

2 Term Rep. 695.

(1) And therefore a bill for this purpose must be filed against both husband and wife, or she will be intended to convey by the compulsion of her husband. Treat. Eq. 34.

Tenants in tail, of a legal estate, cannot by mere agreement or covenant to convey, even though for a valuable consideration, bind the issue in tail, or the remainder-men, for the issue in tail do not claim from the tenant in tail but from the creator of the estate, *per formam doni*, and a court of equity, though the issue are in the power of the tenant in tail, so as to be barred by a particular assurance, will not, unless that assurance be had, deprive them of the title they derive from the original author of the limitation^c. Unless, indeed, (as in the case of an exchange of lands) the issue enter upon the land, and accept the agreement, in which case he shall be bound by it; because by entering upon the recompence which his ancestor received for the estate-tail, he makes himself a party to the original agreement, and is therefore bound in conscience to perform it^d. So neither will the issue be bound by the covenant of tenant in tail for further assurance^e. Nor by articles to convey for payment of debts^f. Nor by a covenant to levy a fine, though there have been a decree for that purpose^g.

These positions must, however, be confined to tenants in tail of the legal estate, for tenants in tail of a trust, or other equitable interest, may in some cases bar the intail by less solemn modes of assurance, because those species of intails being creatures of the courts of equity, (not being within the statute *de donis*), are governed by the rules of those courts, and made subservient to the exigency of circumstances. Thus a trust estate has been held to be

^c 1 Lev. 238; 2 Vent. 350; Hob. 203; *Ross v. Ross*, 1 Cha. Ca. 171; *Coventry v. Coventry*, 10 Mod. 469; *Powell v. Powell*, Prec. Cha. 278; *Sangen v. Wilms*, cited Gilb. Rep. Eq. 164.

^d *Ross v. Ross*, 1 Cha. Ca. 171.

^e *Jenkins v. Jenkins*, 1 Lev. 237.

^f *Herbert v. Freame*, 2 Eq. Ca. Abr. 26, pl. 34.

^g *Weale v. Lower*, 1 Eq. Ca. Abr. 266, cited in *Fox v. Crane*, 2 Vern. 306; though *Hill v. Carr*, as reported in 1 Cha. Ca. 294, seems contrary.

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barred by a feoffment, or a bargain and sale)^b. Lord Cowper, however, doubted whether a deed only, (or a bargain and sale), executed by *cestui que trust* in tail, would bar the remainder-man, or even the issue, "in regard a deed may be made at a tavern, or by surprise, but a recovery is a solemn and deliberate act^c. And Lord Hardwicke is reported to have said^d, not only "that it never had been determined that a lease and release would bar an equitable estate-tail, but that he hoped it never would." Hence, it has now become the common practice to suffer a recovery of trust estates, as well as of legal ones; particularly as this may be done without the concurrence of the trustees^e; but *legal* estates-tail in copyhold^f, as well as equitable^g, may be barred by a surrender alone, unless there be a special custom to the contrary, copyholds not being within the statute *de domis*. And the Lord Keeper, in *Otway v. Hudson*^h, thought, that a devise by will, was sufficient to bar a trust entail of copyholds; and a similar decree was made in *Woolnough v. Woolnough*ⁱ.

And, as tenant in tail is restrained from aliening the estate without fine or recovery, so is he restrained from charging it, or disposing, by contract or agreement, of the lasting improvements after his death. Therefore, if tenant in tail article for sale of the trees growing on the inheritance, the vendee must sever them during the life of tenant in tail; for if he die before they are cut down, his issue shall have them as part of the inheritance, and the vendee

^b *North v. Champernon*, 1 Brow. Cha. v. *Thornton*, 1 Brow. Cha.
 2 Cha. Ca. 64; *Carpenter v.* Rep. 73.
Carpenter, 1 Vern. 440; *Beverley v. Beverley*, 2 Vern. 131; ^k 1 Ves. 260.
Baker v. Bailey, Ib. 225. ^l *Barnaby v. Griffin*, 3
 Ves. jun. 276.
¹ *Legatt v. Sewell*, 1 P. ^m *Otway v. Hudson*, 2 Vern.
 Wms. 87; and see *Weale v.* 583.
Lower, cited 2 Vern. 306; ⁿ *Radford v. Wilson*, 3
Kirkman v. Smith, 1 Ves. Atk. 815.
 260; *Amb. 518*; *Barnaby* ^o 2 Vern. 583.
v. Griffin, 3 Ves. 276; *Savin* ^p Prec. Cha. 228.

shall not be permitted, after the death of tenant in tail, to fell a single tree, though it be half cut down: for, as the tenant in tail has power over the inheritance but during his own life, he cannot delegate that power to another but during the same time; and, consequently, whatever remains part of the inheritance at the death of tenant in tail, at which time his power over it ceases, must necessarily go to the heir to whom the inheritance belongs¹.

But if tenant in tail, having a power to make leases for three lives, covenant to make such a lease, and die before execution, it is said, that a court of equity will carry this into execution against the issue².

The executors of every person are implied in himself, and bound without naming³.

An attorney, having due authority, may bind his client, by an agreement, and will not himself be liable in case of non-performance⁴. But if he act without sufficient authority, or abuse the confidence placed in him, he will himself be answerable; as, where an attorney prevented a debtor from applying to his creditors, to compound his debts, saying that, "he need not trouble himself to go to his clients, for they would be governed by him, and would make no agreement without him, but what agreement he made they would stand by," and thereupon agreed, on their part, for a certain composition, in consideration of which the securities were to be delivered up; on performance by the debtor of his part of the agreement and refusal of the creditors to abide by the contract of their attorney, he was decreed to indemnify the debtor, according to the terms of the agreement⁵.

But a general authority to a steward to make contracts with the tenants, will not bind the lord, unless his ex-

¹ Bro. Contract, 26; 11 Wms. 277; S. C. 2 Eq. Ca. Rep. 50; Poph. 194. Abr. 31, pl. 40. *Et vid.*

² See 10 Mod. 469.

5 Bro. Par. Ca. 547.

³ Per Chancel. in *Hyde v.*

⁴ *Parrot v. Wells et al.*

Skinner, 2 P. Wms. 197.

2 Vern. 127.

⁵ *Johnson v. Ogilby*, 3 P.

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&c.

press consent and approbation of the agreement be given, and part of the bargain be actually executed^a.

And if a joint-tenant enter into an agreement to alien, and neglect so to do, and die, a court of equity will not compel the survivor to perform the agreement^y; unless the articles are such as amount to a severance of the jointure in equity^z.

II. WITH OR TO WHOM A CONTRACT OR CONVEYANCE MAY BE ENTERED INTO, OR MADE.

ALTHOUGH infants, &c. cannot enter into agreements binding upon themselves, except in the cases above recited; yet covenants may be entered into *with* them, and will be binding upon the other party; for the disability imposed by the law upon infants, &c. is intended solely for their own protection and benefit, and not to liberate from their engagements those with whom he may have contracted. Though it has been said that contracts must be mutual, and both parties be bound, or neither; yet for the reasons before given, this rule does not extend to contracts entered into with infants by persons of full age. For an adult knows with whom he contracts, and shall not be relieved against his own folly; nor shall that be turned to the infant's prejudice which was designed as a protection and security to him against his disadvantageous contracts^a. And he may agree to it or not upon his coming of age, at pleasure^b. And it is the same of a feme covert: a conveyance to whom (except immediately from her husband, which is legally impossible, on account of their both being in law deemed but one person^c, will be good, unless avoided by her husband, subject to her power to avoid it

^a *Per* Lord Chan. 5 Vin. Abr. 522, pl. 35. *ham v. Atkins*, 1 Keb. 46; *Forrester's case*, Ibid. 41;

^y See 2 Vern. 63. *Holt v. Clar*, Stra. 937;

^z *Per* Lord Hardw. 2 Ves. 9 Vin. Abr. 393, pl. 4. 634; *et vid.* 1 Inst. 59, b.

^a See *Smith v. Bowin*, 1 Co. Lit. 2, b.
Mod. 25; 1 Vent. 51; *Farne* ^c Ibid. 3, a.

upon the death of her husband if she survive him, or her heir if she do not^d; and the like of an idiot, &c. CONTRACTS,
&c.

We shall now proceed to consider,

III. WHAT MAY BE THE SUBJECT OF A CONTRACT OR AGREEMENT.

GENERALLY speaking, any kind of right or interest, whether of a real, a personal, or a mixed nature, may be made the subject of an agreement, so that it be within the power and control of the party contracting at the time he enters into the agreement; for it is a known rule of law, that a man cannot convey or charge, at least not by contract executed, any thing in which he has not an interest, either *actually* or *potentially* at the *time of the grant or conveyance*, "because it is necessary, that he who by his contract makes another possessor of any thing, should first be himself the proprietor of it^e." If, therefore, a person sell a horse, (and it would be the same of real property) to another, upon condition that he pay for it at Christmas; the vendor cannot, before Christmas, sell it to a third person; and even though the first vendee should fail in payment, and the vendor re-seize the horse after Christmas, the sale will be void at the time of the second contract, for the vendor had neither possession nor property in the horse, but only a condition, which will not enable him to contract for the property and possession^f.

What may be
the subject of
an agreement.

Nor will the law allow a man to grant or incur a burden that to which he has only an inchoate title, or interest to be perfected in future: thus, if a writ of annuity be granted by a prebend, after collation, admission, and institution, but before installation or induction; such a grant, though confirmed by the ordinary and the patron, would be void, because he has but *jus ad rem*, and a future interest,

^d Co. Lit. 3, a.

132; Co. Lit. 41, b; Bac.

^e 1 Pow. Contr. 152.

Max. 78.

^f Plow. 432; and see Hob.

CONTRACTS, and not *jus in re*, until induction, which gives him possession².
 &c.

We must, however, distinguish the last-mentioned case, from those cases in which, although it be uncertain whether the thing granted will ever exist, and it consequently cannot be actually in the grantor or certain, yet it is in him potentially, as being a thing accessory to something which he actually has in him; for such potential property may be the subject of a contract executed: thus, a lord of a manor may part with the profit of his courts for a time to come; and so, a parson may grant all the tithe that he shall have in such a year, although, perhaps, he may have none; for the right to the manor or the advowson is in him, and out of these it is that they arise. So a tenant for life may sell the profits of his lands for three or four years to come, and yet the profits are not then *in esse*¹. So, where a lessor covenanted that it should be lawful for the lessee, his executors and assigns, to carry away, to his own use, such corn as should be growing upon the ground at the end of the term, the lessee was held entitled to the corn so growing; for though the lessor had not the corn actually in him, nor certain, yet he had it potentially; for the land was the mother and root of all the fruits, and, therefore, he that had that, might grant all fruits that might arise upon it afterwards, and the property would pass as soon as the fruits were extant¹.

And so, where the contract is executory only, operating as a declaration precedent, and to the perfection of which some new act or conveyance is necessary, it may be valid, although the subject of it be not yet *in esse*, nor any interest vested in the party; as if a man covenant with another to purchase land before such a day, and levy a fine of it, and that the fine shall enure to the uses expressed in the deed; this will bind the land, although it

² Dyer, 221, pl. 18.

¹ 22 Hen. 6, 43.

¹, *Grantham v. Hawley*,
 Hob. 132.

be purchased afterwards; because there is a new act to be done, viz. the fine^k. So, if I grant unto *J. S.* authority to demise for years the land of which I am now or shall hereafter be seised, and afterwards purchase lands, the demise of *J. S.* will be good, because the demise of my attorney is a new act, and all one with a demise by myself^l: but if there were no new act to be done, then it would be otherwise: as if a man were to covenant with his son, in consideration of natural love, to stand seised to his use of the lands which he should afterwards purchase, the use would be void, because there is no new act, nor transmutation of possession following, to perfect this inception; for the use must be limited by the feoffor, and not by the feoffee, for the feoffee had no interest at the time of the covenant^m. So, if *A.* mortgage land by bargain and sale, and afterwards covenant with *J. S.* in consideration of money which he receives from him, that, after he has entered for the condition broken, he will stand seised to the use of *J. S.* and *A.* enter, and the deed be enrolled, yet nothing passes; because the enrolment is no new act, but a perfective ceremony of the first deed of bargain and sale: and the law is more strong in this case, because of the immediate relation that the enrolment has to the time of the bargain and sale, at which time the bargainor had nothing but a naked conditionⁿ. And for the same reason, if there be two joint-tenants, and one of them bargain and sell the whole land, and before the enrolment, his companion die, nothing passes of the moiety accrued by survivorship^o.

Another observation apposite to this part of our subject is, that the right of disposing, being a right commensurate with, and correlative to property, cannot be extended beyond the ability of the party contracting to dispose; because it is vain and impertinent to contract about matters

^k Bac. Max. 79.^l Roll. Abr. 790; *Jones v. Morley*, Holt, 321.^m Ibid. 80.ⁿ Ibid. 79; *Yelverton v.*^o Bac. Max. 80.*Yelverton*, Cro. Eliz. 401;^p Ibid.

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&c.

which are unattainable: whence it follows, that no right can be created, nor obligation be incurred, by a contract to perform any thing which is naturally impossible. And, therefore, as has been observed in a preceding title, were one man absurd enough to covenant with another to build him a large house in a day; or touch the sky with his hand, or such like impossibilities; these contracts would be void; and the party, undertaking to accomplish them, would be subject to no action, even for damages accruing by reason of non-performance¹. For it cannot be supposed that what is absolutely impossible can have been seriously the subject of deliberation between the parties, for no man in his senses would deliberate about what is absolutely out of his power².

But a distinction is to be taken between things physically impossible, (the impracticability of accomplishing which, must be evident to all the parties at the time of contracting) and things not physically impossible, but of which the impossibility of accomplishing arises from circumstances peculiar to the party contracting; for in the latter cases, although the main contract will necessarily be inoperative on account of the inability of the party to perform it; as if a man contract to sell an estate, the title to which is in another person, or the like; yet that will not discharge the person contracting, from being answerable in damages to the other party, for any loss which he may sustain by the imposition; for although when a person covenants through remissness, or negligence, to undertake an impossibility, the main undertaking must be void, so far as goes to his capacity of performing, yet, upon default in the stipulator, the law will oblige him to answer in damages any detriment the other may have sustained by the non-performance, as a compensation for the loss of the

¹ Bro. tit. Faits, 37; and 40 E. 3, 6 a; and see Co. see Fitzh. Oblig. 13; Puffend. Lit. 206, a. n. (1).
lib. 3, s. 2; and Ibid. note 1; ² Tr. Eq. 8vo. 211.

thing contracted for, as there is presumed to be a tacit condition reserved in the mind of every contracting party, that the thing stipulated be practicable to the party stipulating¹. And therefore, *per curiam*, in *Thornborough v. Whitacre*², if a man will, for a valuable consideration, undertake a thing impossible with respect to his ability, that will not make the contract void; for though the contract be a foolish one, yet it will hold in law, and the party ought to pay something for his folly; for a man may bind himself to do any thing which is not physically impossible; and it will be at his peril if he do not perform it³; the legal distinction between a near and a remote possibility, not being regarded in executory contracts⁴. And, therefore, if *A.* covenant with *B.* that in case he die without issue, he will give his lands in *D.* to his brother; a court of equity will carry this agreement into execution, upon the contingency happening, although a limitation in a deed "after dying without issue" would be void. So a covenant to settle lands, of which a man has only a possibility of descent, will be carried into execution in equity: for a decree of that court does not attach upon the interest in the land stipulated about; but the court enforces the performance of the agreement specifically, by its process against the person, to compel him to execute it⁵.

The subject of every contract must, moreover, be a thing morally and legally, as well as naturally possible to be performed; for it is not enough, that an agreement be made with the consent of the parties, but to make it obligatory, the subject of it must be such as men have a lawful right of stipulating about⁽¹⁾; for it would be absurd that an obliga-

¹ See *Cornwall v. Williams*, cited 1 Pow. Contr. 117.

² 2 Lord Raymond, 1164; 6 Mod. 305.

³ 1 Rol. Abr. 419; *Chomley's case*, 2 Co. 51.

⁴ Tr. Eq. 8vo. 21.

⁵ 1 Pow. Contr. 164.

(1) Puff. b. 3, c. 7, s. 6. *Pacta qua contra leges constitutionesque vel contra bonos mores nullam vim habere indubitat*

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&c.

Illegal subject
of contracts.

tion that derives its sanction from the law should put us under the necessity of doing something which the law prohibits²: and it may be also fairly presumed, that where the object of an agreement is contrary to moral rectitude, the contracting party must have been taken by surprise, and could not have given his full and free assent to it; besides that the law, by forbidding such an agreement to be made, deprives the contractor of the ability to perform it, and consequently prevents the other party from acquiring any right to compel its performance.

Hence it will be proper to inquire what matters are forbidden by law to be the subject of a contract.

Things forbidden by law to be the subject of stipulation, are, 1st, Such as enjoin the commission of what is either *malum in se*, or *malum prohibitum*: 2dly, Such as enjoin the omission of that which the interests of society require should be performed: and, 3dly, Such as promote or encourage such acts, or omissions³. But these have been already considered under the head of conditions void on those grounds, with respect to which and contracts, the law is, I apprehend, precisely the same⁴. It has been there shown, we may recollect, that under the head of contracts void as enjoining or encouraging the commission or omission of things unlawful in themselves, or *mala in se*, are included principally, all such things as are forbidden either by the laws of nature, or the express word of God, as to commit murder, adultery, &c. And within the second or *mala prohibita*, (*i. e.* things contrary to the laws of the land), are included, whatever is either repugnant to the welfare of

² Treat. Eq. 8vo. 223.

³ See *Mitchell v. Reynolds*, 1 P. Wms. 191.

⁴ See vol. iii. p. 274; also Treat. Eq. book i. c. 4; and Fonblanque's notes there.

juris est. Cod. Lib. 2, t. 3, l. 6. "A rule evidently drawn from the principles of universal justice, which, aiming at the prevention of wrong, prohibit agreements which would lead to or encourage wrong." 1 Fonb. Eq. 224, n. (s).

the state; against any maxim of law; or in contradiction to some positive statute; amongst which are agreements respecting unlawful maintenance^a; or encouraging suits and animosities by helping to bear the expense of them^b; agreements entered into with a sheriff for fees, provisions, &c.; marriage brokerage contracts, or contracts for assisting in promoting marriages; contracts entered into in consideration of illicit cohabitation; contracts entered into for the purpose of evading the law; contracts having any fraudulent objects in view; contracts of an unfair nature in respect of their influence on third persons, although not so as between the parties themselves; (as agreements *contra fidem tabularum nuptialium*, or in derogation of the rights of marriage; agreements between a debtor and some of his creditors, to the prejudice of the rest, and the like); agreements for the sale of offices; agreements for more than legal interest; agreements by a bankrupt, or other person on his behalf to pay money to a creditor for signing his certificate; contracts for insuring lottery tickets; contracts self-evidently useless, and tending to no consequence when put in execution; contracts wantonly tending to affect the interest or feelings of third persons, and others there enumerated^c; to which may be added, contracts affected by the practice of puffing, as it is called, at auctions, which in *Berwell v. Christie*^d, was considered as illegal; but the legislature having since that case enacted^e, that property put up to sale at auction shall, upon the knocking down of the hammer, subject the auctioneer to the payment of certain duties, unless such property can, by the mode prescribed by the act, be shown to have been bought in by the owner himself, or by some person by him authorized. This

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&c.

Futile agree-
ments.

^a Carter, 229; 2 Inst. 212.

^b 1 Blac. Com. 428.

^c Vol. iii. p. 278.

^d Cowp. 395; and see *Walker v. Gascoyne*, 13 Vin. Abr. 544, pl. 13.

^e 28 Geo. 3, c. 37, s. 20;

and see *Morrice v. Twining*,

2 Brow. Ch. Ca. 326; *At-*

torney General v. Christie,

1 Fonb. Eq. 227, n. (x).

CONTRACTS, &c. statute has, in the opinion of some, indirectly given a sanction to this practice. The courts, however, appear to have considered this case as not affected by the statute alluded to, and that such a practice is still illegal, and invalidates the sale^f.

IV. OF THE CONSIDERATION NECESSARY TO SUPPORT AN AGREEMENT.

Consideration
of an agree-
ment.

A CONSIDERATION is the material cause or chief support of an agreement; it being that in expectation of which each party is induced to give his assent to what is stipulated. It is not however necessary, in general, that the consideration should appear, nor indeed, if the contract be in writing and legally executed, that there should be any consideration in order to substantiate the transaction; for a man having the *jus disponendi* of his property, may make a voluntary donation of it to another, if he think proper: a consideration, therefore, is requisite to the validity of a contract only when it vests in *feri*, and requires the aid of a court of equity to enforce a specific execution of it, which, guided by the maxim of the civil law, *ex nudo pacto non oritur actio*, they will not do unless it is supported by some adequate consideration; for in the case of a deed or agreement executed, a consideration is in no case essential by the common law, "for although a verbal contract is not binding without a consideration, because words often pass from men lightly and inconsiderately, which may justify a suspicion of imprudence or even fraud, yet when an agreement is made by deed, which must necessarily be made with more thought and deliberation, all suspicion of surprise or deceit is excluded^g.

A consideration may be either good or valuable: a good consideration, is that which arises or is imposed by some natural motive or moral obligation, as in the love a parent

^f See *Howard v. Castle*, 6 *ford v. Preston*, 8 Ib. 95.
Durn. & E. 642; and *Black-* ^g *Plowd.* 308; 3 *Bur.* 1670.

has for his child, or his brother, sister, nephew, niece, or his heir at law; or a devise by a man to pay his just debts, or the like¹. A consideration may also be either express or implied: an express consideration is, when the motive or inducement of the parties in the contract, is distinctly declared by the terms of the agreement; a consideration is implied when an act is done, or forborne at the request of another, without any express stipulation, in which case the law presumes an adequate compensation for the act or forbearance, to have been the inducement of the one party, and the undertaking of the other¹. And a consideration of some sort or other, is so absolutely necessary to the forming of a contract, that a *nudum pactum*, or agreement to pay, or do any thing on one side, without any compensation on the other, is actually void in law, and a man cannot be compelled to perform it². And therefore (and also to prevent a fraudulent disposition of a man's property away from his creditors,) it is declared by the legislature, that all deeds, not founded on a valuable consideration, shall, as against creditors¹, and subsequent purchasers², be deemed fraudulent and void.

And this position will not, perhaps, at law, admit of a single exception, if confined to verbal (or rather oral agreements) but when applied to agreements in writing, it seems to admit of some qualification, and not to extend to cases where the writing, from the solemnity of its nature, either imports a consideration in itself, or from its being a negotiable security, may involve the interests of third persons in its efficacy². Thus, if the contract be evidenced by deed, sealed and delivered; which is founded on there being then more time for deliberation; for when

¹ See 2 Bl. Com. 297, 444; *Beard v. Nuthall*, 1 Vern. 427; 1 Pow. Contr. 330.

¹ Fonb. Eq. 345, n.

² 2 Blac. Com. 445; see Doct. & Stud. b. 2, c. 24; Plowd. 308, b; Dyer, 336, b.

¹ 13 Eliz. c. 5.

² 27 Ib. c. 4. These statutes will be further noticed hereafter.

² See 1 Pow. Contr. 331;

1 Fonb. Eq. b. 1, c. 5. s. 1.

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 &c. the determination of the will to do it, which is one part of
 deliberation; then the party causes it to be written, which
 is another part of deliberation; and, lastly, he delivers the
 writing as his deed, which is the consummation of his re-
 solution. And by the ceremony of the delivery of the
 deed from him that makes it to him to whom it is made
 the former, in consideration of law, gives his assent freely
 and deliberately to part with the thing contained in the
 deed, and that it should pass from him to the other.
 Therefore, on account of this deliberation in the making
 of deeds, they are in law conclusive upon the party exe-
 cuting them, and bind him, without examining upon what
 cause or consideration they were founded^o. Consequently,
 if I by deed, bond, or covenant, bind myself to give
 another 20*l.* to build his house *de novo*, or the like, he
 shall have an action upon this deed, bond, or covenant,
 and the cause or consideration for it is not material; for
 there is a sufficient consideration apparent upon the face of
 the contract, namely, the deliberate will of the party who
 made the deed. Where, therefore, a contract or agree-
 ment is by deed, the party ought, in an action upon it,
 to answer only to the deed, and if he confess it to be his
 deed, he shall be bound: for every deed importing in
 itself a consideration, namely, the will of him who made
 it, a contract or agreement, by deed, is never considered
 as *nudum pactum*. In an action of debt upon an obli-
 gation, therefore, the consideration upon which the party
 gave the bond is not; at law, permitted to be inquired
 into, because it is sufficient to say, that it was the obligor's
 will to make the deed^p. And Mr. Justice Wilmot, in the
 case of *Pillans v. Van Mirop*^q, seems to have been of
 opinion, that the simple circumstance of putting a con-
 tract into writing would be sufficient to take it out of the
 rule as to *nude pacts*, upon the ground that this alone

^o 1 Pow. Contr. 332.

^p Plowd. 309.

^q 3 Burr. 1663; and see

Rann v. Hughes, 7 Durnf.
 & East, 350, n.

would be a guard against surprise, which was the reason of the rule; it having been held by the best authorities, that, according to the law of nature, the want of consideration was no radical defect in a contract, if it were entered into upon deliberation and reflection; for, in that case, it would be morally good, and only require to be proved; and Lord Mansfield inclined to the same opinion. But, if we take a view of the doctrines of the civil law^r; whence the maxim, "*quod ex nudo pacto non oritur actio*," is derived^a, there appears to be reason to conclude this opinion must have been too hastily formed.

The Roman law divided conventions or agreements into two kinds; promises and contracts, which differed in this, that a promise was single and proceeded from the promiser alone, and did not bind until acceptance by the promisee, till when he was at liberty to retract; whilst a contract was the mutual and reciprocal promise of both parties to each other, and equally bound both parties the moment it was entered into.

Contracts were again divided into nominate and innominate. Nominated contracts were so called, on account of their having had particular forms of actions assigned to them, from their frequency and general intelligibility: of this description was letting, hiring, partnership, commission, &c. to which nothing was requisite but the consent of the party. Innominate contracts were such as, being more rare, and not of the same defined and certain nature, the law had not provided any express or peculiar form of action to enforce, but left them open to such suit as was best adapted to the occasion, which was called an action inprescribed terms; and seems to have been analogous to our action on the case, as distinguished from actions of debt, detinue, *ejectione firme*, or the like. These innominate contracts were all included by the civil law under the

^r See 1 Pow. Contr. 334; ^a Cod. lib. 3, pl. 10; lib. 5,
1 Fenb. Eq. 335, n. (a). tit. 14. 1.

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general name of *pacta*¹. *Pacts* were again divided into those with a consideration or cause ; and those without a consideration. The former included all innominate contracts where something was to be given or performed, or *vice versâ*, for a consideration or cause assigned : and for these, as we have just observed, an action was given in prescribed terms ; for if any one by agreement effected any thing (whether it consisted in doing, or delivering ; or in omitting, or withholding something) *hoc animo*, that another in his turn should do something, or deliver something to him, or *vice versâ*, the Roman law obliged him in whose favour the thing executed was done or delivered, to perform his part of the contract. So that if there were a cause or consideration *facti vel traditionis*, a correspondent obligation or pact arose. But pacts, which wanted a cause or consideration, produced no action in the civil forum (unless in cases of sale, which were solemnly ratified according to a form prescribed, when they were called " stipulations," from the word *stipula*, a straw, in allusion to the circumstance, that in such cases a straw was given to the purchaser in sign of a real delivery). And such contracts or pacts, as were innominate in respect of their having no particular form of action assigned to them, and were entered into without a cause or consideration moving from the party to be benefited, were in respect of these circumstances, called *nuda pacta*, or mere naked pacts. It may further also be observed, that stipulations were among the Romans performed with abundance of ceremonies, prescribed for the purpose of distinguishing the deliberate, from a loose and inconsiderate promise or agreement, and were made by questions and answers ; as "*Quod inter nos convenit, hoc te dare facere spondes?—spondeo ; promittis? promitto*," &c. So that by the ancient Roman law, stipulations differed from promises and pacts, inasmuch as the

¹ 2 Blac. Com. 444.

² Vide Authorities cited
1 Fonb. Eq. 335, notes.

former might have been made in simple and ordinary discourse; the latter only in prescribed and solemn language. The former might have been made by writing, between persons absent; the latter by words only, and between persons present. So, likewise, all voluntary nominate contracts were written either by the parties themselves, or by one of the witnesses, or by a domestic secretary of one of the parties, whom they called a notary, (but who was no public person as among us,) and the contract, when finished, was carried to a magistrate, who gave it a public authority by receiving it *inter acta* under his jurisdiction, giving each of the parties a copy thereof under his seal. So that it seems, in both instances, viz. as well in the case of voluntary contracts, as that of stipulations, in order to give effect to the transaction, it was necessary that it should be solemnly confirmed and ratified in the presence of proper persons, according to the rules prescribed by law, or it had no validity. Now it seems reasonable to conjecture, that, when this maxim of the Roman law, "*quod ex nudo pacto non oritur actio*," was adopted and received into our own system, it was accepted in its full extent; and hence, our law not recognizing any ceremonies analogous to a stipulation, (which seems to have been, not the creation, but the ratification of a promise or contract in form before a magistrate) considers verbal agreements, unless sanctioned or induced by some consideration, express or implied, as absolutely void, or *nuda pacta*¹. For though Sir William Blackstone observes², that the rule, "*quod ex nudo pacto non oritur actio*," does not hold in some cases, where a promise is authentically proved by written documents; and instances the cases of a voluntary bond and of a note of hand, yet it is to be observed, that the former of these instances turns upon the ground, that it is an instrument under seal and delivered, which binds the parties, and alters their property, though there be no consideration; because a man is estopped to deny his own deed, or affirm any

¹ Plow. 308, b; Dy. 336, b. ² 3 Blac. Com. 157.

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thing contrary to the manifest solemnity of contracting by delivery: and the latter seems, so far as it applies, to be a case of a distinct species, and not an exception out of this rule. For as long as a note of hand is confined to the parties who make it, the want of consideration is a clear bar to recovering any thing upon it, upon the ground that it is *nudum pactum*. And when third persons become interested in it, the reason why it is not open to the same objection is, that, after it is negotiated, its operation is governed by the same law as a bill of exchange, which is the law merchant^a; and that is founded upon the law of nature and nations, in which the want of a consideration is no essential defect in a contract, as it is in the civil law.

The simply putting a *nude* contract into writing, will not therefore, we may conclude, so far alter its nature as to supply the want of a consideration, and render it valid without that requisite; and hence, we find it is the uniform practice of the Court of Chancery to refuse, unless under particular circumstances, to aid a covenant under seal, if merely voluntary; for, as on such covenants, nominal damages only can be obtained at law; equity, which follows the law, will not give a more substantial relief. If then our law, even in cases of covenants under seal, refuses its substantial aid, either at law or in equity, to the parties claiming under a voluntary contract, though executed with all possible solemnity, accompanied with a delivery, and under seal (which are forms as solemn and notorious as those used in a stipulation among the Romans) *a fortiori*, will it refuse any assistance to enforce a voluntary contract, that wants all of these ceremonies, except only that of being written^b.

A cause or consideration to induce a covenant, may

^a See 3 & 4 Anne, c. 9; 343, note; 1 Pow. Contr. Pearson v. Garrett, 4 Mod. 337.

^b And see 1 Pow. Cont. 242; Jefferies v. Austin, 1 Stra. 674; Bayl. Bills of Exchange, 69; 1 Fonb. Eq. 334, and 1 Fonb. Eq. b. 1, ch. 5, s. 1, n. (a).

arise in two ways^c: first, by some act to be done by the one party, for the benefit of the other party; and secondly, by doing, or preventing something to be done, to the prejudice or loss of one of the parties. CONTRACTS,
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With respect to the first of these considerations, it seems that any thing, however trifling, to be done by the party, will amount to a sufficient consideration to support the contract. As if *A.* demised lands to *B.* rendering rent, and *B.* assigns the same to *D.* and then rent becomes due; and *D.* in consideration that *A.* will show him a deed by which it may appear that such rent is due, promises to *A.* to pay it: if *A.* shows *D.* the lease, by which it appears that such rent is due, *A.* shall have an action upon this promise against *D.* the showing the deed being a sufficient consideration^d.

Secondly, a consideration may arise, by doing or permitting something to be done to the prejudice or loss of one of the parties^e. For it is not absolutely necessary that the consideration for a contract should import some gain to him that stipulates; but it is sufficient if the party, in whose favour the contract is made, forgoes some advantage which he otherwise might have had, or suffers some loss in consequence of placing his confidence in another's undertaking: thus, if a carpenter agree to repair my house before a certain day, and he does not do it, by which my house falls, I may have an action on the contract^f. So, the delivering up securities by which the party deprives himself of the evidence they afforded of his debt, is a good consideration to ground a contract^g. So, where there was an agreement between *A.* and *B.* that *A.* should have a lease of *B.* with divers covenants. And at the time appointed for sealing it, *A.*

^c See Doct. & Stud. lib. 2, cap. 24.

^e 2 Roll. Abr. 22, pl. 23.

^f 9 H. 6, 49.

^g *Sir Anthony Sturley v. Albany*, Cro. Eliz. 67, 150;

Lane v. Mallory, Hob. Cro. Car. 70; and see *Dyer*, 4, 5; S. C. Cro. Jac. 342, 272, pl. 31, note 31.

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refused, on account of a new covenant inserted respecting reparations. Upon which *S.* standing by, took upon himself that if *A.* would seal, he (*S.*) would make the reparations. And it was adjudged a good consideration to support the action against *S.* although the sealing the deed was no advantage to him ^b. So, the delaying a suit has been held a good consideration, it being a benefit to one, and a loss to the other. And *per curiam*, the forbearing of a suit is as beneficial in saving, as some other things would have been in gaining ^l.

The procuring of the letter of attorney from another has also been held a good consideration ^l.

But it is to be observed, that if a consideration be executed, and does not go along with the contract, but is entirely past, and the contract is wholly subsequent, it is not a sufficient consideration to ground a contract upon, unless it is founded upon some prior duty, or something arise between the parties that is meritorious. As if one, in consideration that I have built him a house, quitted him of a trespass, disbursed money on his account, or the like, promise to do a thing, or pay so much money; these are not good considerations, because the consideration is perfectly past, without any present motive or other incident to continue it. This therefore is but *nudum pactum* ^l. So, where a master promised to two men, that in consideration they had bailed his servant out of prison, he would save them harmless; it was held that this did not bind him: because he had no benefit, nor they prejudice by his promise ^m.

^b Dyer, 272, pl. 31, in 381, 382; 1 Roll. Abr. 12, pl. 10.

^l *Bidwell v. Catton*, Hob. 216; and see Cro. Eliz. 74, 75, 849, 881.

^m *Webb's case*, 4 Leon. 110; and see other cases, 3 Bulst. 187; 1 Roll. Rep.

^l 1 Mod. Ent. 88; Plowd. 5, 302; 1 Roll. Rep. 413; *Jeremy v. Goochman*, Cro. Eliz. 442; 1 Roll. Abr. 11, q. pl. 1; 2 Bulst. 73; 2 Leon. 225.

^m Dyer, 272.

We must however be careful to distinguish this kind of case from those, where although some part of the consideration appears to be past, yet it is all but one transaction. As where one, being possessed of a shop, agreed to demise it to another, paying to him 40 s. by the year, and 10 s. for the last quarter; and for the perfecting thereof each gave the other 1 s.; and afterwards, in consideration of the premises, the lessee promised to give the lessor 30 l. in consideration of which, and in performance of the contract, the lessor made a lease to the lessee accordingly; it was objected, that there was no good consideration expressed to raise the promise for the 30 l. the same being grounded upon a consideration that was past, perfect, and executed, and so no good consideration: *sed per curiam*, The lease here is made after the promise; the agreement is in performance of all, not of part; it was on the lessor's part to make the lease to the defendant, and on his part to pay the rent of 40 s. and the 30 l. in consideration of his quiet enjoying the same, which is a good promise, founded upon a good and sufficient consideration^a. So, where the plaintiff was possessed of certain lands for a term of years, and, in consideration that he had occupied the lands and paid the rent, the defendant promised to save the plaintiff harmless: the plaintiff was disturbed, by his cattle being distrained: now, though the occupation and rent was said to be past, yet, as the plaintiff continued in possession, and was still to pay rent, that preserved the consideration, and it was held good^b. So a subsequent contract made by one, in consideration of another marrying his daughter or cousin, which is as a gift in frank marriage, has been holden to be good^c.

So also, a contract on a consideration executed is good, if there subsist a prior duty to perform it: where, there-

^a 1 Pow. Contr. 349; 2 ^b Cro. Car. 409; 3 Salk. Bulst. 73. 96.

^c *Pearle v. Unger*, Cro. Eliz. 94.

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fore, the plaintiff declared, that such a day the defendant was indebted to him in so much, and in consideration thereof, the defendant promised to pay; this is not a consideration past, but the continuance of the debt raises a promise and an action¹. And this seems to be the principle that governed in the case of *Church v. Church*²; there, the plaintiff declared, that, whereas he had at his own charges buried the defendant's child, the defendant promised to pay him his charges: and judgment was given for the plaintiff, and yet the consideration was past; because (it should seem) by the 43d of Elizabeth, the father was bound to bury his child. So, where the plaintiff declared, that, in consideration that he had bought three parcels of land on such a day, the defendant afterwards promised to make him a sufficient assurance; here the consideration was adjudged not to be absolutely past; for the assurance was the substance of the sale³.

And if the contract be founded on a prior moral obligation, as a promise to pay a just debt, it will not be *nudum pactum*, though the debt be bound by the statute of limitations⁴.

A consideration past, will likewise be a good ground to maintain an action upon a subsequent promise or contract, where the consideration is stated to have been at the defendant's special request; for the promise, though it follows, is not naked, but couples itself with the request before, and the merits of the party procured by that suit or request. As, for instance, though a promise to pay 10*l.* for that *W. R.* was bail for my servant is not good; yet a promise to pay 10*l.* for that he was bail for him at my request is good⁵.

¹ *Hodge v. Vavasor*, 1 Roll. Rep. 413; *Johnson v. Astell*, 1 Leon. 198.

² *Church v. Church*, T. Raym. 260.

³ *Warren v. Morse*, Cro. Eliz. 138.

⁴ 2 Blac. Com. 445.

⁵ 1 Roll. Abr. 11; Cro. Eliz. 252, 482; 2 Vent. 268; 3 Salk. 96; 1 Bulst. 120; Dyer, 272, pl. 31; Cro. Car. 409; 2 Cro. 18; Cro. Eliz. 42; and see *Rosden v. Thism*, Cro. Jac. 18.

But a mere stranger to a meritorious act done to another person, will not support an agreement applicable to himself: therefore, where one in an *assumpsit* declared, that in consideration one *A.* would permit the defendants to sue another in his (*A.*'s) name, they promised to pay the plaintiff a sum due from *A.* to him, this was held not to be a good consideration to support the action; for the plaintiff did nothing of trouble to himself or benefit to the defendant, but was a mere stranger to the consideration². But, where a promise was made to the father, that in consideration he would perform such a cure, the father should be paid so much and his daughter so much; there the nearness of the relation carried the benefit of the consideration to the daughter, and it was held that she might maintain an action.

We have mentioned, that the forbearance of a suit is a consideration of an agreement. But in order to this, two things must be observed; first, the forbearance must be general, or for a particular time certain, and not uncertain. And therefore where a defendant promised that in consideration the plaintiff would abstain from prosecuting him for the debt, he would pay it before such a feast; there, inasmuch as it was to forbear generally, and neither mentioned whether it was a total forbearance, or for a time certain, it was held ill¹ (1). But where the consideration was for a forbearance for a reasonable time, it was held good; and that the court ought to judge whether it was a reasonable time or not².

² *Bourne v. Mason et al.* ² *Lutpich v. Hussey*, Cro.
1 Vent. 6; *Dutton v. Poole*, Eliz. 19; *Philips v. Sackford*,
id. 318. Ibid. 455.

¹ *Lenghill v. Broughton*,
Moore, Ca. 1167.

(1) But *quære*. Was not there a plain implication, in this case, of forbearance till the feast?

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Secondly, the forbearance must be from a suit or matter in which the defendant, or the person from whom the debt or thing is said to be due, is chargeable. Thus, where the defendant's son died indebted to the plaintiff; and the defendant, being his mother (but not stating that she was executrix or administratrix to him, or that she had any effects of her son's in her hands) promised, that if the plaintiff would forbear to sue for his debt, she would pay it: this was adjudged to be no consideration; because she was not liable to any suit, so that the plaintiff had no prejudice by such forbearance^a. But where a surety, having paid the debt of his principal, who was dead, told his executor that he had paid the money, who thereupon promised to repay him, if he would forbear till such a day: it was adjudged a good consideration; for the executor was bound in equity, though not at law, without a promise^b.

And idle and insignificant considerations are looked upon as none at all; for, whenever a person promises without a benefit arising to the promiser or loss to the promisee, it is considered as a void promise. Thus, if a man be arrested upon a void arrest, and another, in consideration of setting him at liberty, promises to pay the debt; if the arrest be unlawful, the consideration is not good^c. And where a lessee promised that, in consideration the lessor would forbear to distrain his corn unshocked, he would pay his rent that was due: this was adjudged to be no consideration, because such corn was not distrainable^d. So where the defendant promised, that if the plaintiff would accept the defendant for his paymaster, for a debt due to the plaintiff by a stranger, and would forbear the defendant six months, he would pay the debt: it was adjudged no

^a *Hummers v. Hunton*,
Hard. 73.

^b 3 Salk. 96.

^c *Randall v. Harvey*, Godb.
358.

^d *Goodwin v. Willoughby*,
Hard. 73.

consideration, because the plaintiff might sue the stranger notwithstanding, and therefore was at no prejudice ^c. CONTRACTS,
&c.

But, it is sufficient if there be a colour whereon to found a suit; for in such case forbearance is a good consideration: as in *Whitpool's* case, where an infant bought velvet and silk, and died, and the mercer came to his wife, being his executrix, and said, that if she would not pay him he would sue her, and the wife promised, in consideration of forbearance, to pay him: this was held to be a good consideration, upon the ground of the colour for a suit, she being executrix ^f.

So also may various other considerations be made the foundation of a contract or agreement. Thus, if an agreement be made to save the honour and reputation of a family, to prevent differences between them, or the like, a court of equity, willing to lay hold of any just ground to uphold it, will consider the establishment of the peace of a family as a good consideration ^g.

And in the case of *Edwards v. Warwick* ^h, Lord Macclesfield held, that even if one voluntarily, and without any consideration at all, covenanted to lay out money in the purchase of land, to be settled on him and his heirs, the court of equity would compel the execution of such a contract, though merely voluntary; because in all cases, where it is a measuring cast between an executor and an heir at law, the latter will in equity have the preference ⁽¹⁾.

^c *Lee v. Newcomb*, Hard. 1 Cha. Rep. 84; *Cann v. Cann*, cited 1 Atk. 10; and see 9 H. 5, 14; Bro. tit. Debt, 36.

^f Latch 142; *Dyer*, 272, pl. 31, in note.

^g *Stapilton v. Stapilton*, 1 case, 1 Ves. 450.
^h 2 P. Wms. 176.

(1) But Mr. Powell in citing this case, in his *Essay on Contracts*, makes a *quære*, whether the intent in favour of the heir, be not a sufficient consideration to support the covenant? See *Pow. Contr.* 362.

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&c.

Generally speaking, in executory contracts, if the agreement be that the one shall do an act, and for the doing thereof, the other shall pay, &c. so that the considerations are mutual; the doing of the act is a condition precedent to the payment, and the party who is to pay will not be compelled to part with his money, till the thing be performed for which he is to pay¹. But this rule admits of some diversities: as, first, if a day be appointed for the payment of the money, and the day is to happen before the thing can be performed, an action may be brought for the money, before the thing be done; for, it appears the party relied upon his remedy, and did not intend to make the performance a condition precedent². Secondly, where a certain day of payment is appointed, and that day is to happen subsequent to the performance of the thing to be done by the contract; in such case performance is a condition precedent: for every man's bargain ought to be performed as he intended it; and when he relies upon his remedy, it is but just that he should be left to it according to his agreement. But, on the contrary, there is no reason that a man should be forced to trust where he never meant it. And, therefore, if two men should agree one that the other should have his horse, the other that he would pay ten pounds for him; no action would lie for the money until the horse was delivered³. But thirdly, if another, in consideration that I promise to do such a thing, promise to do another thing for me, or to pay the money at such a day; here I need not first perform what I promised, before I can maintain an action; because the consideration and foundation of his promise to me was the promise I made to him; it is promise for promise; and that is the consideration and not the performance, and each party has a right

¹ *Thorpe v. Thorpe*, 1 Vent. 177, 214; 3 Salk. 95.

² 48 Edw. 3, 2, 3; 7 Co. 100, b; 1 Vent. 147; 1 Saund. 319.

³ *Ibid.*; Jones, 218; *vide contra*, Dyer, 76, pl. 30; 1 Roll. 414, 415; Dyer, 30, pl. 203.

of action against the other for non-performance^m. And it is a general rule, that when the defendant has a remedy for the consideration of a promise, that consideration need not be averred to be performed: as if, in consideration that *A.* promises to deliver me to my use a cow, *B.* promises to deliver *A.* 50*s.* Here *B.* may bring his action before the delivery of the cowⁿ. So if I covenant to marry a man's daughter, and he covenants to give me a hundred pounds, either party may sue the other without performance on his part. Again, if it be mutually agreed between *A.* and *B.* that *A.* shall, before Lady-day following, convey over all her estate and interest in the real estate of *B.* deceased, to *C.* and her heirs; and, in consideration thereof, *C.* shall, before that time, pay to *A.* 25*l.* and convey unto her and her heirs so much of the said real estate as shall amount to 50*l.* per annum, and enter into a bond of 2,000*l.* And *B.* at the same time, in consideration that *A.* promises to perform her (*A.*'s) part of the agreement, promises to perform her (*B.*'s) part of the same. Here neither party, on bringing an assumpsit, need aver performance on her part. For the performance is not *sub modo* or conditional, but absolute and reciprocal, by reason of the agreement; for it is not in consideration that *A.* should convey all her estate, &c. but in consideration that she agrees to do it. And the consideration upon which the action arises, is the mutual promise to perform the agreement^o (1).

The construction of the statute of 13 Eliz. c. 5, against fraudulent conveyances, seems also referrible to this head.

Construction of
13 Eliz. c. 5.

^m 1 Vent. 177, 214; Hob.
88; 2 Lev. 293; 3 Bulst.
187.

ⁿ 5 Hen. 7, 10.
^o Hardw. 102; and see
1 Pow. Contr. 353, &c.

(1) Mutual promises must be both binding, as well on the one side as the other; and must be both made at the same time, or else they will be both *nuda pacta*. Salk. 21; Hob. 88.

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The object of the legislature in passing that statute, was evidently to protect creditors from those frauds which are frequently practised by debtors, under the pretence of discharging a moral obligation; for as to those gifts or conveyances which want even a good or meritorious consideration for their support, their being voluntary, seems to have been always a sufficient ground to conclude that they were fraudulent. But though the statute protects the legal rights of creditors against the fraud of their debtors, it anxiously excepts from such imputation the *bonâ fide* discharge of a moral duty; it does not, therefore, declare all voluntary conveyances, but all fraudulent conveyances, to be void^p. And whether the conveyance be fraudulent or not, is declared to depend on the consideration being good and *bonâ fide*. And a gift made for such consideration ought certainly to prevail, unless it be found to break in upon the legal rights of others; but if it does break in upon such rights, it is equally clear that it ought to be set aside; if, therefore, a man being indebted, convey to the use of his wife or children, such conveyance would be within the statute; for though the consideration be good, yet it is not *bonâ fide*, that is, the circumstances of the grantor render it inconsistent with that good faith which is due to his creditors. And *per* Lord Hardwicke, if there be a voluntary conveyance of a real estate, or chattel interest, by one not indebted at the time, though he afterward becomes indebted, if such voluntary conveyance was for a child, and there is no particular evidence or badge of fraud to deceive or defraud subsequent creditors, it will be good; but if any mark of fraud, collusion, or intent to deceive subsequent creditors appear, that will make it void (1).

^p 1 Cha. Ca. 99, 291; 1 Vent. 194; 1 Mod. 119; 1 Atk. 15; Cowp. 708.

(1) *Townshend v. Wyndham*, 2 Ves. 11. See also *Stileman v. Ashdown*, 2 Atk. 481; *Foe v. Rushleigh*, Cowp. 711; *Russell v. Hammond*, 1 Atk. 13. The cases of *Jones v. Marsh*, Forrest,

This distinction is drawn from considerations too obvious to require illustration from cases; for if a man indebted were allowed to divest himself of his property in favour of a wife or child, his creditors would be defrauded: but if a man not indebted could not make an effective settlement in favour of such objects, because, by possibility he might afterwards become indebted, it would destroy those family provisions which are, under certain restrictions, a benefit to the public, as well as to the individual objects of them¹. It may, however, be material to observe, that the grantor being indebted is not the only badge of fraud, several other circumstances are enumerated in *Twyne's case*², as furnishing a strong presumption that the transaction is *mala fide*. Thus, if the conveyance contain a power of revocation, or a power to mortgage, it will be considered as fraudulent against creditors³, if the grantor be allowed to continue in possession, the conveyance being absolute⁴; or if the conveyance or gift be of the whole or greater part of the grantor's property, such conveyance or gift will be presumed to be fraudulent, for no man can voluntarily

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¹ See *Walker v. Burrows*,
1 Atk. 94.

² 3 Co. 82.

³ *Tarbut v. Marbury*, 2
Vern: 510.

⁴ *Stone v. Grubham*, 2 Bulst.
218.

Forrest, 64, and *Hungerford v. Earle*, Vern. 261, may, however, be thought to weaken the authority of the distinction taken by Lord Hardwicke in *Townshend v. Wyndham*; Lord Talbot having, in *Jones v. Marsh*, declined giving any opinion how far a family settlement, without consideration, would be fraudulent against subsequent creditors, though the party was not indebted at the time; and Hutchins, Lord Commissioner, having held such settlement to be void. It is observable, however, that Lord Talbot was not, by the circumstances of the case before him, called upon to give his opinion, and that the opinion of Hutchins was evidently influenced by the provisions of the settlement not having been pursued. And see *Lilly v. Osborne*, 3 P. Wms. 298; *Fryer v. Flood*, 1 Bro. Ch. Rep. 160.

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divest himself of all or the most of what he has, without being aware that future creditors will probably suffer by it. In short, if the transaction be chargeable with any circumstance sufficiently strong to raise a presumption of its being a fraud, it cannot be supported unless some other consideration be interposed to obviate the objection arising from the general nature of the transaction; as, where the husband, after marriage, being indebted, conveyed an estate to trustees to the separate use of his wife, it was held, that the trustees having undertaken to indemnify the husband against the wife's debts, was sufficient to support the settlement, as made for a valuable consideration (1). But it is to be observed, that though a voluntary contract will in general be void against any creditor, yet it will be binding on the party himself, and also all persons claiming under him as mere volunteers*.

But though a consideration is requisite to support an agreement, it is not necessary that the consideration should be expressed in contracts or agreements, it being sufficient if it can be collected out of them from circumstances; and, therefore, although in Lord *Baltimore's* case^x, which arose on an agreement concerning the boundaries of two provinces in America, nothing valuable appeared on the face of the articles to be given as a consideration; yet Lord Hardwicke held, that the settling boundaries, and peace and quiet, was a mutual consideration on both sides; and would, in all cases, make a

* See 1 Fonb. Eq. 270, n. (a); and see Ib. 335, n. (a).

^x 1 Ves. 459.

(1) *Stevens v. Olave*, 2 Brow. Rep. 90. But if this transaction had been with a view to defraud creditors, it would probably have been set aside; for, "if the transaction be not *bonâ fide*, the circumstance of its being, even for a valuable consideration, will not take it out of the statute." Per Mansfield, *Cadogan v. Kennett*, Cowp. 434; *Stileman v. Ashdown* 2 Atk. 477.

consideration to support a suit in the Court of Chancery for performance of such an agreement. And the consideration is therefore, in practice, seldom inserted. But, *per Parker, Ch. Just. in Mitchell v. Reynolds*⁷, it is best that a good or sufficient consideration, in an agreement for restraint of trade, should appear upon the face of the contract, because wherever such contract stand indifferent, and for aught that is known may be good or bad, the law *prima facie* presumes it to be bad. And it seems to be the better opinion, that if an express but insufficient consideration appear on the face of the agreement, no other can be implied⁸.

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V. OF THE REQUISITES TO A VALID CONTRACT IN RESPECT OF OUTWARD CIRCUMSTANCES.

THE common law required no other solemnity in passing lands or tenements, but that of livery and seisin, which being a transfer of the feud *corum paribus curtis*, and testified by them, was held an act of sufficient notoriety to direct the lord of whom to demand his services, and strangers against whom to commence their actions⁹; but now, by the 29 Car. 2, c. 3, it is enacted¹⁰, that all leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making and creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases and estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect; any consideration for making any such parol leases or

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must be in
writing.

⁷ 1 P. Wms. 292.

⁸ *Bedell's case*, 7 Rep. 40;

⁹ 1 P. Wms. 176.

¹⁰ Co. Lit. 48; Spelm.

Gloss. 510; 9 Co. 137; Roll.

Abr. 7; and see Treat. Eq.

b. 1, c. 3, s. 8.

¹¹ Sec. 1

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estates, or any former usage to the contrary notwithstanding. Except ^c leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord, during such term, shall amount unto two third parts, at the least, of the full improved value of the thing demised.

That ^d no leases, estates or interest, either of freehold or terms of years, or any uncertain interest, not being copyhold or customary interest, of, in, to, or out of any messuages, manors, lands, tenements or hereditaments, shall be assigned, granted or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting, or surrendering the same, or their agents thereunto lawfully authorized by writing; or by act or operation of law.

That ^e no action shall be brought whereby to charge any executor or administrator, upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person ^f; or to charge any person upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized.

That ^g all declarations or creations of trusts, or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust; or by his last

^c Sec. 2.

^d Sec. 3.

^e Sec. 4.

^f See *Coster v. Becket*, 7 T. R. 201.

^g Sec. 7.

will in writing, else they shall be utterly void and of no effect (1). CONTRACTS,
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Provided ^b that where any conveyance shall be made of any lands or tenements, by which a trust or confidence shall or may arise, or result by the implication or construction of law, or be transferred or extinguished by an act of, or operation of law, then and in every such case such trust or confidence shall be of the like force and effect as the same would have been if the statute had not been made.

That ⁱ no contract for the sale of any goods, wares, and merchandizes, for the price of ten pounds sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment; or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged, or their agents thereunto lawfully authorized.

In considering this statute we may inquire, 1. What shall be deemed such a note or memorandum as to take the case out of the statute: 2. What has been construed to amount to a signing by the party: and 3. What agreements have been deemed without the statute, and exempt from the necessity of being put into writing.

As to the first of these points, it is said, that this writing must not only be in manuscript or in print, but on paper or parchment, ^j "for if it be written on stone, linen, leather, or the like, it is no deed; wood and stone may be more durable, and linen less liable to erasure, but paper

^b Sec. 8.

ⁱ Sec. 17.

^j Co. Lit. 229.

(1) By 4 Anne, c. 16, s. 15, it is declared, that declarations of uses, trusts, &c. of fines or recoveries, shall be valid and effectual, though the deed of uses be made after the levying or suffering of such fine or recoveries.*

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and parchment unite more perfectly than any other both these durable qualities, nothing else being so durable and at the same time so little liable to alteration^k." The student will probably, however, doubt whether the courts would, if called upon, set aside a formal agreement entered into by the parties, on the sole ground of its not being written on one of these two individual species of manufacture. Hence if in any treaty, the parties come to an agreement, which is never reduced into writing, nor any written proposal made for that purpose, so that the parties rely wholly on their parol agreement; neither party can compel the other to a specific performance, the statute being directly in their way. Thus, where a person, before his intermarriage with his wife, promised that she should enjoy her own estate to her separate use, and agreed to execute a writing to that purpose, which he had instructed counsel to draw; but when they were to be married, the writing not being perfected, he desired this might not delay the match, but engaged, that upon his honour, the lady should have the same advantage of the agreement as if it were in writing drawn in form by counsel, and executed; whereupon the marriage took effect: it was held, on a bill for specific execution, that, there being no fraud, and the plaintiff relying solely upon the honour, word, or promise of the defendant, and the statute making these promises void, equity would not interfere; and that the circumstance of the instruction having been given to counsel for preparing the writings was not material, since, after they had been drawn and engrossed, the parties might have refused to execute them^l (1).

^k 2 Blac. Com. 297.*Sir George Maxwell*, 1 P.^l *Countess Montacute v. Wms.* 618; *Prec. Chan.* 526.

(1) But it seems to have been formerly doubted, whether, if it were charged that the agreement was stipulated to be put in writing, this circumstance would not be a sufficient ground for excluding the statute from attaching upon the agreement.

And in a case where a memorandum of the proposed agreement was actually put into writing, it was nevertheless held to be within the statute, for want of being signed by the party: thus, where a marriage treaty was depending, and the intended husband and the young lady's father went to a counsellor's chambers to have a settlement drawn, in consideration of the portion the father proposed to give, where minutes of the agreement were taken down in writing by the counsel, and given by him to his clerk, to be drawn up in form: the next day the father died, and the day following the marriage was solemnized. This agreement, notwithstanding the preparations, was held, by Lord Cowper, to be within the statute of frauds and perjuries, it being no agreement, but only preparatory heads which were afterwards to be drawn into form. It might therefore have received several alterations or additions, or been entirely broke off upon further inquiry or information of the party's circumstances^m. And, in a subsequent case, the decision was still stronger as to this point. There the plaintiff agreed with the defendant to sell him a house for 640 l. and, by consent of both parties, an attorney was employed to make a draft of the conveyance; which the attorney accordingly prepared and sent to the defendant, who made several alterations in his own handwriting, and delivered it back to the attorney to be engrossed. A time was then appointed for the parties to meet at a tavern to execute the writings, and for the defendant to pay the money. The plaintiff and his attorney went to the tavern, and the plaintiff there executed the writings. But although the agreement was actually put into writing in the draft of the conveyance, which had

^m *Bawdes v. Amburst*, Prec. Ch. 402; and see 3 Atk. 504.

agreement. *Seale v. Morris*, 1 Cha. Ca. 135; *Hollis v. Whiting*, 1 Vern. 151. And see 1 Fonb. Eq. b. 1, c. 3, s. 10, n. (l).

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been altered by the defendant with his own hand, yet it was holden on a bill filed for the purchase-money, that he was not bound, he not having signed the agreement^a.

2. Another point agitated on the construction of this statute has been what act of the party shall amount to a signing. As to which it has been said, that if the name of the party be anywhere found upon the instrument, it will be a signing within the statute, if the intent of the parties was that the person should be bound, and there was an acceptance of the contract on the other side^o. And therefore, where a mother was not a party to a deed of articles made on her daughter's marriage, but was proved to have known and agreed to them, and to have been privy to the actual marriage which took place upon them, and signed them as a subscribing witness: this was held, by the Master of the Rolls, and afterwards by Lord Hardwicke, to be a sufficient signing, within the spirit, and also within the words of the statute. And the mother was decreed to perform her part of the agreement^p. But in another case, where the parties having come to an agreement for the renewal of a lease, and *M.* being called upon by *S.* to name a person to prepare the lease, named a *Mr. T.* for that purpose, and wrote certain instructions from whence the lease was to be prepared; on a question made, whether there was a sufficient signature by *M.* to take this agreement out of the statute of frauds; it was held unanimously by the Court of Exchequer, that there was not; for, that the signature required by the statute was to have the effect of giving authenticity to the whole instrument; and where the name was inserted in such a manner as to have that effect, it did not much signify in what part of the instrument it was to be found; but it could not be imagined

^a *Hawkins v. Holmes*, 1 Will. 770; and see *Lowther v. Carrill*, 1 Vern. 221; and *Whaley v. Baganal*, 6 Brown's Par. Ca. 45, (and *post*, 364); *Cooke v. Tombs*,

Anstr. 420, (and *post*, 365); *Lea v. Barber*, Anstr. 425, n.

^o See *Buckhouse v. Crosly*, 2 Eq. Ca. Abr. 32, pl. 44.

^p *Welford v. Beezley*, 1 Ves. 6; 1 Wils. 118.

that the name inserted in the body of an instrument, and applicable to particular purposes, could amount to such an authentication as the statute required¹. CONTRACTS,
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But it seems that the signature of either party alone will be sufficient to establish the agreement, if an acquiescence in it by the other party can be shown, either by some writing under his hand, or some act done, from which the law will infer his assent². Thus, where *A.* agreed for the sale of houses to *B.* and drew up a note of the agreement in writing, which *B.* signed, but *A.* himself did not, he was held to be bound nevertheless; for by drawing up the agreement in his own hand, and procuring *B.* to sign it, it was said, he made the signing of *B.* not only a signing for himself, but also a signing as authorized by *A.* to close the agreement³.

A letter will, also, in equity, amount to an agreement, and be binding on the person signing it, if another person, by acting upon it, show his acceptance of the propositions contained in it. Thus where, on a treaty of marriage, the lady's father promised, by letter, to give with her 1,500*l.* down, and 500*l.* more at his death, if she should have issue; and the marriage was had: it was held, that this letter was a good agreement binding upon the father, and entitled the husband to the 1,500*l.* immediately upon his marriage⁴. And so, where a father wrote a letter signifying his assent to the marriage of his daughter, and mentioning that he would give her 1,500*l.* but afterwards by another letter, upon a further treaty concerning the marriage, went back from the proposals of his letter; and then, at some distance of time declared, that he would agree to what was

¹ *Stokes v. Moore et Ur.* Ca. Abr. 21, pl. 10; S. C. 2 cited 1 Fonb. Eq. 177, note; Chan. Ca. 164.

and see *Hawkins v. Holmes*, ² *Moor v. Hart*, 2 Rep. Chan. 147; S. C. 1 Vern.

1 P. Wms. 770, n. (1). ³ See *Halfpenny v. Ballet*, 201; *Wanchford v. Fotherly*, 2 Vern. 373; S. C. 1 Eq. Ca. 2 Vern. 322; S. C. 2 Freem.

Abr. 20, pl. 6; *et infra*. ⁴ *Hatton v. Gray*, 1 Eq. 201.

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proposed in the first letter. This letter was held a sufficient promise in writing within the statute of frauds; the last declaration having set the terms in the letter up again, and the husband having shown, by his marriage of the daughter, his acceptance of them^a (1). Again, where *A.* covenanted to convey tithes to *B.* his executors and assigns, for years; and then *B.* being in treaty for the sale of them to *C.* said, by letter, "that if he parted with the tithes, it should be on the conditions therein particularly mentioned." *C.* accepted of the terms, and *B.* was decreed to perform the agreement; for the letter took the case out of the statute of frauds, as being an agreement signed by the party to be charged with the same; and there was no need, the Lord Keeper said, for its being signed by both parties^v.

But such a letter cannot be set up as an agreement, unless it contain the precise terms of the contract; and therefore where *A.* having agreed with *B.* for the sale of nine houses, which were in mortgage for 150 *l.* sent a note to the mortgagee to the following effect; viz. "Mr. *C.* pray deliver my writings to the bearer, I having agreed to dispose of them;" and it was held, that this letter or note would not bring the case out of the statute, because it ought to be such an agreement as specified the precise terms of the contract, which this did not, though it was signed by the party; for it did not mention the sum that

^a *Bird v. Blosse*, 2 Vent. Abr. 527, pl. 17; S. C. 2 Eq. 361.

^v *Coleman v. Upcot*, 5 Vin.

(1) But a letter from a father to his daughter, by which he agreed to give her 3,000 *l.* as a portion, but which was not shown to the man who afterwards married the daughter, was not considered as entitling him to a decree for the money, although he had married the daughter. The reason for which seems to have been, that the son-in-law could not be considered as having, by the marriage, accepted an agreement of which he had no knowledge. *Ayliffe v. Tracey*, 2 P. Wms. 65; 9 Mod. 3.

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was to be paid; nor the number of houses that were to be disposed of, whether all, or some, or how many; nor to whom they were to be disposed of; nor did the letter mention whether they were to be disposed of by way of sale or assignment of lease; and therefore all the danger of perjury which the statute was meant to provide against, would be let in to ascertain this agreement*. And so, in the case of *Montacute v. Maxwell*, before mentioned, a letter from Sir George to his lady, written after the marriage, expressing that he was always willing she should enjoy her own fortune as if sole, and that it should be at her command, was held not to be such an evidence under his hand of the agreement before the marriage, as would take the case out of the statute; the letter consisting only of general expressions; but it was said by the Chancellor, that had it recited or mentioned the former agreement, and promised the performance thereof, it had been material. And it may here be noticed (if at all necessary to be mentioned), that the whole of the deed must be written (except the filling up of blanks)*, before the execution of it by the parties; for if a man were to sign a blank paper or parchment with directions that such an agreement should be fairly written, it would be void, although the same was so written accordingly, and without fraud*.

3. It now only remains to inquire, what contracts are considered in equity as not within the statute; and therefore binding, though not put into writing. Although the statute has provided, that no agreement on marriage, or for the purchase of lands, &c. shall be good, unless signed by the party to be bound, or some person by him authorized; yet, as upon every question on a statute against fraud, the end and purpose of making it is considered;

Cases not within the statute.

* *Seagood v. Meale et al.*
Prec. Cha. 560; S. C. 2 Eq.
Ca. Abr. 49, pl. 20; *Strange*,
426; and see *Clerk v. Wright*,
1 Atk. 13, and 1 Fonb. Eq.
b. 1, c. 3. s. 10, n. (k).

* *Paget v. Paget*, 2 Rep.
Ch. 187.
* *Shep. Touch. 54; Perk.*
s. 118.
* *Ibid.*

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which, in this instance, is to prevent frauds and perjuries, and not to vacate bargains fairly and honestly made; in the latter cases, courts of equity consider themselves unrestrained by it; because, as the parties are in conscience bound to perform such agreements, they ought not to be permitted to take advantage of the want of mere solemnities, whether imposed by the common law or statute^a: with this view, courts of equity have considered agreements, in which there has been no danger of fraud or perjury, as out of the statute. Therefore, although the words of the statute are general, namely, "upon *any* agreement made upon any consideration of marriage, or upon any contract or sale of lands, &c." which phrase is sufficient, in point of extent, to comprehend all agreements, and all contracts; yet, as in the construction of the statute, the end and intent of the makers of it is to be considered, which was to prevent frauds and perjuries, all such contracts and agreements as, though not in writing, are in their own nature free from all danger of introducing fraud or perjury, and out of the purview of the statute. Upon this principle it has been determined, that a judicial sale of an estate under a decree is clearly out of the mischiefs intended to be prevented by the statute^b. And upon the same principle, it is held, that purchases made before the Master, are out of the statute; and therefore, the Court of Chancery will, in such cases, carry into execution, against the representative, a purchase by a bidder before the Master without the bidder's subscribing, after confirmation of the Master's report, that he was the best purchaser: the judgment of the court taking such cases out of the statute^c. So, though the authority of an

^a *Symondson v. Tweed*, 5 Vin. Abr. 522, pl. 34; *and Eq. Ca. Abr. 47.*
Prec. Cha. 374; S. C. Gilb. Rep. Eq. 35; Croyston v. Banes, *Prec. Cha. 208; Lord Vaughan v. Morgan*, *Finch*, 138; and see *Hodgson v. Hut-*
^b *Attorney General v. Day*, 1 Ves. 218.
^c *Per Lord Hardw.* 1 Ves. 221.

agent, who subscribes for a bidder before a Master, cannot be proved, yet if the Master's report can be confirmed, the court will carry it into execution, unless there be some fraud; for it is all exclusive of any defence that may still be set up on the other side^d. And Lord Thurlow was of opinion, that attornies concerned in a suit, were competent to make agreements by parol relative to the order of the court^e. An agreement with the court of aldermen, (who are guardians of city orphans, and without whose leave no man can marry such orphan, but under pain of imprisonment) though by parol only, and without writing, has also been held good: this being an institution that existed prior to the statute^f.

Also if, on a bill filed by either vendor or vendee for a specific performance of a parol agreement, setting forth the substance of it in the bill, the defendant, by his answer, admit the facts as stated in the bill, this takes the agreement entirely out of the mischief pointed at by the statute, and a court of equity will decree it, because the defendant confessing the agreement, there can be no danger of perjury from a contrariety of evidence^g (1). And, even though it be denied by the defendant in his answer, yet if it be proved that he had at any time admitted the agreement, the court will decree it to be executed^h.

And in some cases, both courts of law and equity (for the rule is the same in both) will admit proof of parol

^d *Per* Lord Hardw. 1 Ves. 221. ^e 1 Ves. 441; 3 Atk. 3; 10 Mod. 404; and see 1

^f *Cor v. Peele*, 1 Bro. Fonb. Eq. b. 1, c. 3, s. 8, n. (d.) Rep. 334. ^g *Only v. Walker*, 3 Atk.

1 P. Wms. 714.

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(1) And if the party himself die, his heir will, it seems, be bound on a bill of revivor; the principle going throughout, and binding the representative equally with the principal. *Per* Lord Hardwicke, 1 Ves. 221.

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agreements, as circumstantial evidence to control written ones, to prevent the fraud which would otherwise take place (1). Thus the defendant may, on a bill for specific performance of a written agreement, insist upon a subsequent parol agreement between the parties, by which the former has been discharged or varied. As, where a tenant agreed in writing to take a house at 32*l.* per annum, to be repaired by the owner, but it being afterwards discovered that it must be rebuilt, this was done without cancelling the written agreement; and the tenant, in consideration of the expense the owner must incur by rebuilding, agreed by parol, that 8*l.* per annum should be added to the 32*l.* The court, on a bill filed by the tenant for a specific performance of the written agreement, received evidence of the parol agreement, and dismissed the bill with costs, notwithstanding its being insisted that the written agreement should speak for itself, and that no evidence could be admitted to contradict it¹ (2)

Another ground upon which cases have been held to be out of the purview of this statute is, that the statute ought not in any case to be so construed as to create or promote

¹ *Legal v. Miller*, 2 Ves. 299; and see *Goman v. Salisbury*, 1 Vern. 240.

(1) See as to this, Treat. Eq. b. 1, c. 3, s. 11, and n. (e) and (p) there.

(2) But in the case mentioned above, the court being satisfied from the parol evidence, that a specific performance of the written agreement ought not to be decreed, would not, on dismissing the bill, make a decree according to the parol agreement set up by the defendant; the Master of the Rolls saying, that it would be very hard upon a defendant, if, when a plaintiff unconscientiously brought him into a court of equity for the specific performance of a written agreement, and the defendant insisted on an agreement different from that which the plaintiff set up, and the plaintiff replied to his answer, and insisted on his former demand, and went into proof, and then, finding he could not have the decree prayed by his bill, he should be allowed to resort to that which the defendant set up.

fraud^k; which was the principal object it was intended to prevent (1). And therefore, where an agreement has been partly carried into execution, and one party has incurred an expense upon the strength of it, the agreement will be decreed, though resting on parol evidence only. Thus, the lessee of a building-lease by parol, having begun to build, may compel his bargain to be completed (2). For the lease being in part executed by the lessee, the lessor shall not take advantage of his own fraud, and run away with the improvements made by his lessee. So, where money was otherwise expended on the premises in pursuance of a parol promise of a lease, a specific performance was decreed; although the terms were not precisely stipulated between the parties, at the time of the agreement^l (3).

^k Prec. Cha. 519; and ^l *Anon.* 2 Eq. Ca. Abr. see 1 Fonb. Eq. b. 1, c. 3, 48, pl. 17; 5 Vin. Abr. 523, s. 8, n. (e). pl. 40.

(1). Upon similar principles the registering acts have been considered as not protecting purchasers, who have notice of preceding incumbrances not registered, from such preceding incumbrances, although their purchases be registered. First, because such statutes, being made to prevent fraud, ought not to be so construed as to encourage it. Secondly, such statutes are considered as leaving the subjects to which they apply, open to all equity.

(2) 2 Eq. Ca. Abr. 48, pl. 16; 5 Vin. Abr. 522, pl. 38; Prec. Cha. 56, pl. 1; and *Foxcroft's* case, in Dom. Proc. cited Prec. Cha. 519; Gilb. Rep. Eq. 4; *et* Ibid. 11, where it is said, that the lessor, in this case, when dying, declared that he ought to have made a lease in writing, but the heir told him he should not discompose himself, for he would supply it; whereby, and by other fraudulent means, the lessee was prevented from suing the lessor. But see *Floyd v. Buckland*, 2 Freem. 268. This point expressly so determined on the ground of performance. See *Pym v. Blackburne*, 3 Ves. jun. 38, n. (a); *Wills v. Stradling*, Ib. 378.

(3) But there is said to be a difference where the money expended is for lasting improvements, and where for fancy or humour. Treat. Eq. b. 1, c. 3, s. 9, and see Fonb. notes there; see also Ib. s. 1, n. (c).

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&c.

But, in two cases, wherein bills were exhibited to have an execution of parol agreements, touching leases of houses, which set forth, that in confidence of these agreements, the plaintiffs had expended great sums of money in and about the premises; and where the agreements were respectively laid to be, that it was stipulated the agreement should be reduced into writing, the statute was pleaded. And the Lord Keeper said, that the difficulty which arose upon this act of parliament was, that the act made void the estate, but did not say the agreement itself should be void; and therefore, though the estate itself was void, yet possibly the agreement might subsist, so that a man might recover damages at law for the non-performance of it; and if so, he would not doubt to decree it in equity. And his Lordship directed, that the plaintiff should declare at law upon the agreements, and that the defendants should admit the agreements, so as to bring this point in judgment at law, and then, he said, he would consider what was further to be done in the case^m.

And, upon the same principle, *i. e.* to prevent and discountenance fraud, the Master of the Rolls decreed the payment of a portion, where, on a marriage agreed upon between the plaintiff and the defendant's daughter, the agreement was reduced into writing, and signed by the plaintiff, and delivered to the defendant to be signed, who refused. But his objections to signing not being to any material parts of the agreement, and he having permitted the plaintiff to court his daughter, and the marriage having been afterwards had, and he not having declared his dislike until asked for payment of the portion, and having permitted the young person to live with him, the Master of the Rolls decreed a specific performance; considering the

^m *Hollis v. Edwards*, and 1, 2; and see 1 Fonb. Eq. *Deane v. Izard*, 1 Vern. 159; b. 1, c. 3, s. 7, n. (b); and S. C. 1 Eq. Ca. Abr. 19, pl. s. 9, n. (f), and (i).

defendant's conduct as founded in fraud^a. So where, upon a bill for a portion upon marriage of the plaintiff with the defendant's daughter, it appeared that there was no note or agreement in writing signed by the defendant for the payment of it, but that a letter had been written to the plaintiff by a third person, offering a portion, which was done by the defendant's consent, and that a treaty for a suitable settlement was had with him; but the matter being long in suspense, the marriage took place in the mean time; the court, although it appeared that the defendant, before the parties went to church, declared he would give them nothing, and the statute of frauds was insisted upon, decreed for the plaintiff; considering the countermand as nothing after the young people's affections were engaged^o.

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&c.

Possession, delivered in pursuance of an agreement, is also deemed such a degree of performance, as is sufficient to take a contract out of the statute, although the purchaser has not expended money upon the premises. Because the mischief intended to be prevented by the statute was in respect of such agreements only of which no part was carried into execution, and which were set up merely by parol: and therefore execution by one party has been looked upon as so far conclusive, as to induce the court to decree an execution by the other party, rather than the agreement, so far as it has been already carried into execution, should be destroyed^p. Thus, where A. agreed to sell lands to C. and a memorandum was drawn up of the agreement (but not signed by either party) and soon afterwards, C. put in his cattle and made encroachments on other lands of A., upon which A. refused to complete the bargain, and re-sold the land to D.; but, *per curiam*, inasmuch as possession was delivered according to the agreement, the

^a *Halfpenny v. Ballet*, 2 Freem. 201; 2 Vern. 322, Vern. 373; *et vide* S. C. S. C. Préc. Cha. 404, 405.

^p See Pow. Contr. 300.

^o *Wanchford v. Fotherley*,

CONTRACTS, bargain was executed, and a specific performance must
etc. be decreed¹.

Again, where, previous to the defendant's marriage, a sum of money, the property of his wife by a former marriage, was agreed to be assigned to trustees for her separate use during coverture, and to be applied after her death to such uses as she should appoint; and after the marriage a draft of an assignment was prepared, and corrections made in the husband's hand-writing; and he suffered her to receive the interest of it to her separate use during the coverture. These circumstances were considered by Lord Hardwicke as a part performance, and as taking the agreement out of the statute. His Lordship observing that, if the statute were suffered to be pleaded to the discovery even of a parol agreement in such cases, it would be very mischievous².

And an agreement by parol partly performed, will be decreed against the heir of the vendor under it³. But as the principle which governs the court is, that the act done in part performance, is presumptive evidence that the agreement was really made, it must be of such a nature, as the court is satisfied would not have been done, unless on account of the agreement. And therefore, where a lessee agreed by parol to take a lease for a term of years certain, and continued possession on the credit of it; there being no writings to make out the agreement, it was held to be directly within the statute⁴.

¹ *Butcher v. Stapely et al.* 1 Vern. 363; and see *Pyke v. Williams, (et c contra)*, 2 Ib. 455; and *Borret v. Gemeserra*, Banb. Rep. 94; 2 Eq. Ca. Abr. 48, pl. 17; also *Lady Herbert v. Earl Powis et al.* 6 Bro. Par. Ca. 102.

² *Taylor v. Beach*, 1 Ves. 297.

³ *Lacon v. Martins*, 3 Atk. 1; 1 Ves. 312; 2 Dick. 664; and see *Hawkes v. Hawkes*, Finch. 300.

⁴ *Samsun v. Butter*, 1 Bac. Abr. 74; per Lord Hardw. 3 Atk. 4; *Smith v. Turner*, cited Prec. Cha. 561; and see *Hole v. White*, cited Bro. Rep. Cha. 409.

Marriage alone is not considered in equity as a part performance of an agreement made between the parties themselves, although it is considered as such to bind a third person^{*}: and therefore, though in the case before mentioned of a letter written by a father, promising to give such a fortune with his daughter to any one who should marry her, this entitles the husband to recover; because the agreement is executed on his part as far as it can be; yet a promise of marriage between parties by parol, upon certain conditions, and an intermarriage accordingly will not entitle either party to compel a performance of the conditions; and the reason why marriage alone is not looked upon as an execution of the parol contract between the parties, so as to take such case out of the statute, seems to be, that if it were, the statute would be entirely evaded; for all promises of this kind suppose a marriage had or to be had^{*}.

The circumstance of one party desisting from his purchase in favour of another party on certain conditions stipulated, has also been said not to be such a part performance as to take an agreement in favour of the party desisting out of the statute: thus, where A. being about to purchase a toft of ground of B., and C. being also treating for the same premises, met together; and it was proposed and agreed, that A. should desist and permit C. to purchase, he agreeing to let A. have, at a proportionable price, that part of the ground he desired; and thereupon A. desisted, and B. completed his purchase; and afterwards A. refused to perform the agreement: on a bill filed by A. upon the ground of the agreement's being in part executed, by his desisting from prosecuting his purchase, a specific performance was decreed at the Rolls: but on appeal to the Chancellor, the decree was reversed (1).

^{*} See *Viscountess Montacute v. Maxwell*, and *Samson v. Butler*, *supra*.

^{*} *Prec. Cha.* 561; and see *Brownsmith v. Gilborne*, *Strange*, 738.

(1) See *Lamas v. Bayly*, 2 Vern. 627; *sed quare*; and see *Vin. Abr.* 521, pl. 32; and 2 *Eq. Ca. Abr.* 45, pl. 10, both which

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Moreover, in a case where, on a bill filed for specific execution of a parol agreement for the purchase of an estate, proof was adduced of the delivery of a rent-roll to the purchaser, altered and dated by the seller in his own hand-writing; of his delivering the deeds to the purchaser's agent, to be compared with the rent-roll, and laying an abstract of his title, and a case thereupon, before counsel, in which it was stated, that the purchaser had agreed with the seller for the purchase of the lands at twenty-one years purchase; of his giving the purchaser a list of his debts which affected the estate, and authorizing him to apply to his creditors, to several of whom, and to other persons, the seller was charged to have written letters himself, informing him that he had agreed with the purchaser to sell; and of his afterwards sending to the tenants to treat with A. as owner of the estate, for renewal of leases, and to cut down timber; and to prevent the effect of an *elegit* against him, of his producing evidence before a jury that such agreement and purchase had been made; all these circumstances were held to be insufficient, on the ground of a part execution, to take the agreement out of the statute of frauds⁷.

Again, where, on a bill for a specific performance of an agreement for the sale of certain freehold premises and stock in trade, it appeared, that pending the negotiation, the defendant delivered to the plaintiff a particular of the premises and property to be sold, and the terms or conditions of the sale, all in his own hand-writing, and signed.

⁷ *Whaley v. Bugenall*, 6 Bro. Par. Ca. 45.

which seem to be the same case as that reported in *Vernon*, and these reporters rest the Chancellor's decree on the ground that there was no absolute nor positive agreement, the words being ambiguous and uncertain; and not on the ground that the forbearing by agreement to do an act might not be a part performance, and raise as strong an equity to have the benefit stipulated in return, as an act done.

by him, when it was agreed, that the plaintiff should have till a certain day to consider of the purchase, as he objected to the price. It was afterwards agreed, that the purchase should take place at a reduced price; and verbal instructions for a conveyance were given by both parties together to an attorney, to whom the defendant delivered the particular as instructions for the deed, which was prepared, read over, and approved by the parties. The Court of Exchequer held, that these circumstances were not sufficient to take the agreement out of the statute: that the particular was not made out as evidence of any agreement, but merely as a list or catalogue of the matters for sale, to enable the purchaser to form a proper estimate of their value: that it was delivered into the attorney's hands for the same purpose: and was signed merely to authenticate it as such list: that it was delivered in as the foundation of a sale at a higher price; and could be no evidence of the terms of the second contract, or even of its existence; since with the price, the parcels also may have been varied: that the instructing an attorney to draw conveyances, and his doing so, is no part performance of a contract: to take the case out of the statute, there must be a part execution of the substance of the agreement itself: that the agreement being void as to the land, must be void also as to the personal property, which was to be sold with it; it is one entire contract, and the whole must stand or fall together: that it could never be the intention of the parties, that the stock should be sold apart from the premises, as most of it was of little comparative value separately; and the agreement being for one entire sum, they could not sever it*.

But possession, under a parol agreement, of however long standing, will not be a ground to establish it, if it appear that the persons who made such agreement had not a right to contract. As if an agreement for partition be

* *Cooke v. Tombs*, Anstr. 420; *Lea v. Barber*, Anstr. 425, n. S. P.

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&c. made by two husbands, of land belonging to their wives, without the consent of the wives; for they cannot thereby bind the inheritance of their wives*.

Having now sufficiently considered the requisites to constitute a valid contract or agreement, as the foundation of the deed by which such contract may be perfected, or executed, I shall proceed to consider the nature and different species of deeds themselves, and the ceremonies requisite to give them effect.

CHAP. II.

OF A DEED.

DEEDS.

IN consequence of the admission of the right of property, or the allowance by the law of society of an exclusive right to those things which by the law of nature were in common, it was necessary that some means should be devised, not only by which that separate right or exclusive property should be originally acquired, which, we have more than once observed, was that of occupancy or first possession, but also by which this possession, when once gained, might be continued, and transferred from one person to another; for without this, upon the demise of the proprietor, it would again become common, and all those mischiefs and contentions would ensue, which the right of property was introduced to prevent. For the purpose, therefore, of continuing the possession, the municipal law of most countries has established *descents* and *alienations*; the former to continue the possession in the heirs of the proprietor, after his involuntary dereliction of it by his death; the latter to continue it in those persons to whom,

* *Ireland v. Rittle*, 1 Atk. 626.

by his own voluntary act, he shall choose to relinquish it in his life-time. A transfer of property being once admitted by law, it became necessary that it should be properly evidenced; in order to prevent disputes, either about the fact, as whether there was any transfer at all; or concerning the persons, by or to whom it was transferred; or with regard to the subject matter, as what the thing transferred consisted of; or lastly, with relation to the mode and quality of the transfer, as for what period of time (or, in other words, for what estate and interest) the conveyance was made. The legal evidences of this transfer of property are called, in the laws of England, the common assurances of the realm; whereby every man's estate is assured to him, and all controversies, doubts, and difficulties are either prevented or removed^b.

These common assurances are made in four ways. 1. By matter *in pais*, or deed; which is an assurance transacted between two or more private persons *in pais*, in the country; that is (according to the old common law) upon the very spot to be transferred. 2. By matter of record, or an assurance transacted only in the king's public courts of record. 3. By special custom, obtaining in some particular places, and relating only to some particular species of property. Which three are such as take effect during the life of the party conveying or assuring. 4. The fourth takes no effect till after his death; and that is by devise, contained in his last will and testament^c. Of all these I shall treat in the order they have been here mentioned.

A DEED has already been defined to be a writing sealed and delivered by the parties in evidence and execution of some prior agreement^d. The land does not pass by the words of the deed; the deed is therefore only evidence of the will and direction of the parties; it is the preceding or accompanying ceremony, (as livery in some cases, the

Definition of deed.

^b 2 Blac. Com. 294.

^c Id. *ibid*.

^d Co. Lit. 35, b. 171; 1 Lit. s. 370; 1 Inst. 290.

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statute of uses in others, surrenders, &c. in others,) that transfers the land. It is sometimes called a charter, *carta*, from its materials; but most usually, when applied to the transactions of private subjects, it is called a deed, in Latin *factum* (1), *κατελογον*, because it is the most solemn and authentic act that a man can possibly perform, with relation to the disposal of his property; and therefore a man shall always be *estopped* by his own deed, or not permitted to aver or prove any thing in contradiction to what he has once so solemnly and deliberately avowed^c. If a deed be made by more parties than one, there ought to be regularly as many copies of it as there are parties, and each should be cut or indented (formerly in acute angles *instar dentium*, like the teeth of a saw, but at present in a waving line) on the top or side, to tally or correspond with the other; which deed, so made, is called an indenture. Formerly, when deeds were more concise than at present, it was usual to write both parts on the same piece of parchment, with some word or letters of the alphabet written between them; through which the parchment was cut, either in a straight or indented line, in such a manner as to leave half the word on one part and half on the other. Deeds thus made were denominated *syngrapha* by the canonists^f; and with us *chirograph*, or hand-writings^g; the word *cirographum* or *cyrographum* being usually that which is divided in making the indenture^b: and this custom is still preserved in making out the indenture of a fine, of which hereafter. But at length indenting only has come into use, without cutting through any letters at all; and it seems at present, except in some particular cases which

^c Plowd. 434.^b And see Co. Lit. 143, b.^f Lyndew, l. 1, t. 10, c. 1. n. (4). 222, a. n. (1.); Mod.^g Mirror, c. 2, s. 27.

Form. Angl. Diss. 29.

(1) For the difference between deeds and charters, see Mod. Form. Angl. Diss. Co. Lit. 9, b. n.

will be hereafter mentioned, to serve for little other purpose than to give name to the species of the deed. When the several parts of an indenture are interchangeably executed by the several parties, that part or copy which is executed by the grantor is usually called the original, and the rest are counterparts; though of late it is more frequent for all the parties to execute each part, which renders them all originals (1). A deed made by one party only is not indented, but polled or shaved quite even; and therefore called a deed-poll, or a single deed¹, for being a declaration by one party only, and not an agreement between two or more, one part only, to be retained by the donee as evidence against the other, is all that is necessary^j.

Some deeds must be indented in order to their validity, for the purposes for which they are used, as bargains and sales to be enrolled^k, bargains and sales of bankrupt's estate^l, leases by ecclesiastical persons, or persons seised in right of their wives^m, indentures of apprenticeship, &c.; but all the parts of an indenture make up but one deed in judgment of law, and each part is of as great force as both, or all the parts together, and they are esteemed the mutual deeds of all parties, and either party may be bound by either of the parts; and the words of the indenture are the words of all parties; for though they be spoken as the words of one party only, yet they may be equally applied to the other party, if they more properly belong to him; for all words in an indenture, which are doubtful, shall be applied and expounded to be spoken by him to whom they will best agree, according to the intent of the parties; and

¹ Mir. c. 2; Lit. s. 371,
372.

^l 13 Eliz. c. 7; and see 43
Ib. c. 18.

^j Lit. s. 370.

^m 32 Hen. 8, c. 28.

^k 27 Hen. 8, c. 16.

(1) A counterpart is, however, admissible evidence of the original. See *Eyton v. Eyton*, Prec. Ch. 116.

DEEDS they shall not be taken more strongly against one, or beneficially for the other, as the words of a deed-poll shall^a. And hence also, an indenture made in the first person, is as valid as if made in the third person, provided both parties put their seals^b. But although both parts of the indenture are but as one deed, yet the part of the grantor is as the principal, and the other but a counterpart^c. And therefore, though if the lessor only seal and not the lessee, it is holden as good as if both had sealed; yet if there be any difference between the parts^d, the counterpart shall be made to agree with the principal. An indenture is of more forcible operation than a deed-poll, inasmuch as it works an estoppel, *i. e.* doth bar and conclude either party to say or except any thing against its contents. If, therefore, a lease be by indenture, both parties are concluded to say, that the lessor had nothing in the land at the time of the lease made; so that if the lessor happen to have the land afterwards by purchase or descent, the lessee may enter upon him by way of conclusion, and the lessee by estoppel shall be forced to pay his rent^e. But it is otherwise of a deed-poll, for this is commonly but of one part, which is sealed by the feoffor, lessor, &c. only. And this shall therefore be expounded to be the sole deed of him who made it, and bind him only, and be also expounded altogether in his favour, and against the feoffor, lessor, &c. Nor does this work any estoppel against either party^f. But whether a deed be indented or poll, if there be reciprocal covenants between the parties, and each of them seal and deliver it to the other, it is good for both parties; and he who can get the deed into his hand to show or plead it, may take advantage of it against the other. And in this case the deed is usually kept by one indifferent between them both^g.

^a Plow. 134; Lit. 370.^b Lit. s. 373.^c Finch's Law, 109.^d Shep. Touch. 52.^e Plow. 434, 421.^f Shep. Touch. 52.^g Co. Lit. 143.

We must now consider the requisites to a deed.

DEEDS.

1. The first requisite of a deed is, that it be in writing.

Deed must be
in writing.

Formerly, many conveyances were made by parol, or word of mouth only, without writing, accompanied however by some ceremony symbolical of a delivery of the thing intended to be transferred⁽¹⁾; but this giving a handle to a variety of frauds, the statute 29 Car. 2, c. 3, we have seen, enacts, that no estate, or interest in lands, tenements, or hereditaments, made by livery of seisin, or by parol only, (except leases, not exceeding three years from the making, and whereon the reserved rent is at least two-thirds of the real value) shall be looked upon as of greater force than an estate at will; nor shall any assignment, grant, or surrender of any interest in any freehold hereditament, be valid, unless in both cases the same be put in writing, and signed by the party granting, or his agent lawfully authorized, in writing.

And the deed must be all written before the sealing and delivery of it; for if a man seal and deliver an empty piece of paper or parchment, although he give directions that an obligation or other matter shall be written on it, and this be done accordingly, yet it will be no good deed*. This writing must be (as has been before observed) on parchment or paper, for if an agreement be written on a piece of wood, linen, the bark of a tree, a stone, or the like, and this be sealed and delivered; this is no good deed*. Wood or stone may be more durable, and linen less liable to erasures; but writing on paper or parchment unites in itself, more perfectly than any other way, both those desirable qualities, for there is

* Perk. s. 118; Co. Lit. 171; Shep. T. 54. * Co. Lit. 229, a; F. N. B. 122.

(1) Ingulph, in his History of the Abbey of Croyland, says, "*conferebantur multa prædia nudo verbo, absque scripto vel charta, tantum cum domini gladio galea, vel cornu, vel cratera, et plurima tenementa cum calcari, cum strigili, cum arcu; et nonnulla cum sagitta.*" Pref. Mad. For.

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nothing else so durable, and at the same time so little liable to alteration; nothing so secure from alteration, that is at the same time so durable⁷. But it may be written in any language, or in any hand⁸. And therefore it is held, that a deed written in French or Latin, and in text, court, or Roman hand, is as good as a deed written in English and in a secretary hand. And though there be any alteration, erasure, or interlining, made in any part of the deed before the delivery of it, this will not hurt the deed^a (1). The matter written, must be legally and orderly set forth: *i.e.* there must be words sufficient to set forth the agreement and bind the parties; for a deed may be void and lose its virtue wholly or in part, for repugnancy or uncertainty^b. But it is not material whether the deed be in the first, or in the third person, so as the words be aptly applied^c. Neither is it necessary that the English or Latin, whereby it is made, be true and congruous; for false and incongruous Latin or English seldom or never hurts a deed: for the rules are, *Falsa orthographia non vitiat chartam. Falsa grammatica non vitiat concessionem*^d. Neither is it necessary that a deed have all the usual parts, as premises, *habendum*, &c. for a deed may be good without either *habendum*, *tenendum*, warranty, reservation, or covenant. But, as these formal and orderly parts are calculated to convey that meaning in the clearest, distinctest, and

⁷ 2 Blac. Com. 297.^b Co. super Lit. 225.⁸ 2 Co. 3.^c Fitz. Fait. & Feoffments,^a Perk. s. 155; Shep. T. 55; Co. Lit. 225; and see 1 Keb. 21.

5; Dyer, 6.

^d 5 Co. 121; 10 Ib. 133; Co. Lit. 6.

(1) But in such cases it is proper to make a memorandum of it upon the back of the deed, and to give the witnesses notice of it; for otherwise if it be in any place material, as in the name of the grantor, grantee, in the limiting of the estate, or the like, and especially if it be in a deed-poll, the deed is greatly suspicious. Shep. Touch. 55.

most effectual manner, and have been well considered and settled by the wisdom of successive ages, it is prudent not to depart from them without good reason or urgent necessity^a. And a deed is good, although these words in the close thereof, *In cujus rei testimonium sigillum meum apposui*, be omitted; and although there be no mention made in the same that it was sealed and delivered^f; so as in truth it be duly sealed and delivered, and the sealing and delivery can be proved. Also a deed is good, though it mention no time or place of date or making, or have a false date, or be dated at one time and delivered at another; and although it have an impossible date, as the 30th of February, or the like^g, for anciently, until the time of Edw. 2, and Edw. 3, deeds had no date; because the law was then held to be, that if a deed were dated before the time of memory it was not pleadable, except it were of record^h.

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2. The second thing required in every well made deed is, that the person making it be able to give, grant, make, or do the thing contained in it; that the person to whom it is made, be capable of taking the thing to be given, granted, made, or done thereby; for if it be made by or to any such persons as are disabled, as infants, aliens, women covert, persons attainted of treason or felony, idiots, and such like, it will be void or voidable, in all or partⁱ. But any person natural, male or female, or politic, as sole corporations, or corporations aggregate of many, ecclesiastical or temporal, not disabled by law, may give or take by deed. But with respect to these things, particular inquiry has already been made, under the head of Agreements j.

Parties to a deed.

3. The third thing required in a deed is, that if the party

Deed to be read.

^a 2 Blac. Com. 298.

^b 2 Co. 5; 5 Ib. 117; Dyer,

^f 2 Co. 5; Dyer, 19; Keilw.

28; Perk. s. 120; Co. Lit. 6, a.

70.

ⁱ 11 Co. 73; Plow. 555;

^g See *Cromwell v. Grunden*, 2 Salk. 462.

Perk. s. 1. 119.

j *Ante*, c. 1.

DEEDS.

who is to seal it, be a blind or an illiterate man, and desire to hear it read, that it be so; for if such a man be to seal a deed, and he desire to hear it, or to hear the contents of it read, or declared to him first, and it be not done, and he afterwards seal or deliver it, this is no good deed^k. So if upon or without any such request made by him who is to seal and deliver it, the party himself to whom it is made, or a stranger, shall read the deed, or declare the contents of it, falsely and otherwise than in truth it is, the deed will be void, at least for so much as is so misread or misdeclared. But if the party himself who is to seal and deliver it, before the sealing and delivery, cause another person who is a stranger covinously to read it, or to declare the contents to him, otherwise than it is, on purpose to make the deed void, this will not hurt the deed, for no man shall be permitted to take advantage of his own wrong. So if the party that is to seal the deed, can read himself, and does not, or being an illiterate or a blind man, does not require to hear the deed read, or the contents declared, in these cases, although the deed be contrary to his intention, yet it is good and unavoidable^l.

Deed must be stamped.

4. A further requisite to a deed, seems to be, that the paper or parchment upon which it is written, be properly stamped, as required by the several statutes made for that purpose; because otherwise the deed cannot be given in evidence. This, however, appears to be the only necessity for having a stamp imposed; as the want of a stamp "does not prevent the intrinsic operation or legal effect of the deed, but only puts a stop to or suspends its being pleaded or given in evidence in any court, or admitted in any court to be good, useful, or available, until the duty and penalty be paid, and the receipt be given for the same, and the deed be properly stamped. This, therefore, only affects the use to be made of the deed, its good-

^k *Manser's case*, 2 Co. 11
1b. 27; *Thorogood's case*, 9
1b. 36.

^l *Shep. Touch.* 56.

ness in court, and the capacity of availing one's-self of it there, without rendering the deed itself inoperative or ineffectual in other respects. It only imposes an incapacity of availing one's-self of the operation of the deed till the duty and penalty be paid, &c. without making the deed itself invalid; for the incapacity of availing one's-self of the deed is to cease upon payment and receipt thereof, which supposes a subsisting and continuing intrinsic validity, good, useful, and available, on such payment, though rendered unavailable till then; for if a deed had no validity at all till such payment, it could not be available, as its effect and operation must primarily and substantially depend on its original nature and validity; and it can be only available according to that^m. And, accordingly, where a patent, which had been given in evidence, was not stamped at the time it was sealed, and the question was, Whether the patent ought to have been admitted as evidence? the whole court were of opinion, that, being stamped at the time of the trial, it was admissible evidence; for that the intention of the stamp act is not to make unstamped deeds absolutely void, but to add a penalty, (which had in that case been paid) for enforcing the payment of the stamp dutyⁿ.

But where the legislature have appropriated a stamp to any particular form of instrument, a substitution of another stamp, though of equal value, will not give validity to such instrument; for as long as a distinction of the several stamps is preserved by the legislature, it must be adhered to by the courts of justice. Hence, articles of agreement, under seal, stamped with an agreement stamp, were holden to be inadmissible in evidence, though the agreement stamp which they bore was of the same value with the stamp which they required, viz. a deed stamp^o.

^m *Fearne's Posth. Works*, *Anon. Stra.* 575; and *Salk.* 411. 612.

ⁿ *Rex v. Bishop of Chester*, ^o *Robinson v. Drybrough*
Stra. 624; 3 & 6 W. 3, c. 21; 6 Term Rep. 317; but see
and see 8 Mod. 226, 364; 55 Geo. 3. c. 184.

DEEDS.

Deed must be
signed and
sealed.

And though it has been said that one country will not take notice of the revenue laws of another, yet it hath been holden, that a party cannot give in evidence a written contract made in Jamaica, which, by the laws of that island, was void for want of a stamp².

5. A fifth requisite to a deed is, that the party whose deed it is should seal, and now, in most cases, sign it also. The use of seals, as a mark of authenticity to letters and other instruments in writing, is extremely ancient. We read of it among the Jews and Persians in the earliest and most sacred records of history¹. And in the book of Jeremiah there is a very remarkable instance, not only of an attestation by seal, but also of the other usual formalities attending a Jewish purchase³. In the civil law also⁴, seals were the evidence of truth; and were required, on the part of the witnesses at least, at the attestation of every testament. But in the times of our Saxon ancestors, they were not much in use in England. For though Sir Edward Coke⁵ relies on an instance of King Edwin's making use of a seal about an hundred years before the Conquest, yet it does not follow that this was the usage among the whole nation: and perhaps the charter, he mentions, may be of doubtful authority, from this very circumstance of being sealed; since we are assured, by all our ancient historians, that sealing was not then in common use. The method of the Saxons was for such as could write to subscribe their names, and, whether they could write or not to affix the sign of the cross: which

² *Alves v. Hodgson*, 7 Term Rep. 241.

¹ 1 Kings, c. 21; Daniel, c. 6; Esther, c. 8.

³ "And I bought the field of Hanameel, and weighed him the money, even seventeen shekels of silver. And I subscribed the evidence, and sealed it and took wit-

nesses, and weighed him the money in the balances. And I took the evidence of the purchase, both that which was sealed according to the law and custom, and also that which was open." C. 32.

⁴ Just. Inst. 2, 10. 2 & 3.

⁵ 1 Co. Inst. 7, 70, a.

custom our illiterate vulgar do, for the most part, to this day keep up, by signing a cross for their mark, when unable to write their names. And, indeed, this inability to write, and therefore making a cross in its stead, is honestly avowed by Cædwalla, a Saxon king, at the end of one of his charters¹. In like manner, and for the same insurmountable reason, the Normans, a brave but illiterate nation, at their first settlement in France, used the practice of sealing only, without writing their names: which custom continued when learning made its way among them, though the reason for doing it had ceased; and hence the charter of Edward the Confessor to Westminster Abbey, himself being brought up in Normandy, was witnessed only by his seal, and is generally thought to be the oldest sealed charter of any authenticity in England². At the Conquest, the Norman lords brought over into this kingdom their own fashions; and introduced waxen seals only, instead of the English method of writing their names, and signing with the sign of the cross³. And in the reign of Edward I. every freeman, and even such of the more substantial villeins as were fit to be put upon juries, had their distinct particular seals⁴. The impressions of these seals were sometimes a knight on horseback, sometimes other devices: but coats of arms were not introduced into seals, nor indeed into any other use, till about the reign of Richard the First, who brought them from the crusade in the holy land; where they were first invented and painted on the

¹ "*Propria manu pro ignorantia literarum signum sancte crucis expressi et subscripsi.*" Seld. Jan. Angl. l. 1, s. 42. And this (according to Procopius) the emperor Justin, in the east, and Theodoric, king of the Goths in Italy, had before authorized by their example, on account of their inability to write.

² Lamb. Archeion, 51.

³ "*Normanni chirographorum confectionem, cum crucibus aureis, aliisque signaculis sacris, in Angliâ firmari solitam, in eâdem impressam mutant, modumque scribendi Anglicum rejiciunt.*" Ingulph.

⁴ Stat. Exon. 14 Edw. I.

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shields of the knights, to distinguish the variety of persons of every Christian nation who resorted thither, and who could not, when clad in complete steel, be otherwise known or ascertained⁷. This neglect of signing, and resting only upon the authenticity of seals, remained very long among us; for it was held in all our books, that sealing alone was sufficient to authenticate a deed: and so the common form of attesting deeds, "sealed and delivered," continues to this day; and mankind might perhaps safely rely upon the authority of seals, whilst signets were carefully preserved, and the arms or impressions were appropriated; but as population increased, and the same arms were indiscriminately used by many, the evidence of seals necessarily became uncertain and unsatisfactory. Hence the statute 29 Car. 2, c. 3, before-mentioned, revives the Saxon custom, and expressly directs the signing, 'in all grants of lands, and many other species of deeds: in which, therefore, signing seems to be now as necessary as sealing⁸, though it hath been sometimes held, that the one includes the other⁹.

✓ But if a stranger seal it by the allowance or command precedent, or agreement subsequent, of the grantor, before the delivery of it, it is as well as if the party to the deed sealed himself^b. And therefore, if another man seal a deed of mine, and I take it up after it is sealed and deliver it as my deed, this is said to be a good agreement to and allowance of the sealing, and so a good deed. And if the party seal the deed with any seal besides his own, or with a stick, or any other thing which makes a print, it is good. And although it be a corporation that makes the deed, yet they may seal with any other seal besides their common seal, and the deed not the worse^c; and so also a man may sign, seal, and deliver a deed by attorney, or person

⁷ 2 Blac. Com. 299.

^b Perk s. 130, 131, 134.

⁸ And see *Farmer v. Rogers*, 2 Wils. 26.

^c Ibid. s. 130, 131, 132,

134.

⁹ 3 Lev. 1; 2 Stra. 764.

or persons properly authorized in that behalf, *per qui facit*, *per alium facit*, *per se*, and the execution by the attorney is deemed the execution by the party himself, and is consequently done in his name, and not the name of the attorney^d. And by sealing the deed, a person is bound by it, though he be not made a party to it^e. And in some cases a person may be bound by a deed without sealing it all: for where three persons were enfeoffed by a deed, and there were several covenants in the deed on the part of the feoffees, and only two of the feoffees sealed the deed, the third entered and agreed to the estate conveyed, he was held to be bound by the covenants^f. And it is said, that if lands are leased to two, and only one of them puts his seal, but the other agrees to the lease and enters, he shall be charged with the rent, though he never sealed the deed^g. This doctrine however must, it should seem, be confined to such covenants as are parcel of the lease, and not to covenants on conditions in gross, contained in the deed; by which he will not be bound, unless he seal the deed, though he be made party to it^h.

6. The sixth thing required in every well made deed is, that there be a delivery of itⁱ. Delivery of the deed.

Delivery is either actual, *i. e.* by doing something and saying nothing, or else verbal, *i. e.* by saying something and doing nothing, or it may be by both; and either of these will make a good delivery and a perfect deed. But by one or both of these it must be made; for otherwise although it be ever so well sealed and written, yet is the deed of no force. And though the party to whom it is made take it to himself, or happen to get it into his hands, yet it will do him no good, nor him that made it any hurt,

^d *Fontin v. Small*, Stra.

^e 38 Ed. 3, 9.

703.

^f 2 Roll. Rep. 63.

^g See *Salter v. Hedgley*, Carth. 76.

^h 2 Co. 4; *Ib.* 5; Perk. s. 137.

ⁱ 2 Roll. Rep. 63.

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until it be delivered^j. And a deed may be delivered by the party himself that makes it, or by any other by his appointment or authority precedent, or assent or agreement subsequent, for *omnis ratihabitio mandato equiparatur*^k. And when it is delivered by another having a good authority, and he pursues it, it is as good a deed as if it were delivered by the party himself: but if he do not pursue his authority, then it is otherwise. And therefore, if a deed, or the contents thereof, be read or declared to a man that is to seal it; and he (being illiterate) doth deliver it to a stranger, and bid him examine it; and if it be so as it was read to him, then to deliver it as his deed, otherwise to re-deliver it to him again that made it; in this case if the deed be, in truth, otherwise than it was read, and yet notwithstanding he, to whom it was delivered, doth deliver it to him to whom it is made, this delivery shall not avail, neither is the deed by this delivery become a good deed, it not being done pursuant to his authority^l.

And as a deed may be delivered by, so it may be delivered to the party himself to whom it is made, or to any other by sufficient authority from him: or it may be delivered to any stranger for, and in the behalf, and to the use of him to whom it is made, without authority^m. But if it be delivered to a stranger without any such declaration, intention; or intimation, unless where it is delivered as an escrow, it seems this is not a sufficient delivery. And yet if an obligation be made to the use of a third person expressed by the deed, and the obligor deliver it to him to whose use it is made; this is said to be a good deliveryⁿ. And although it be delivered before or after the day of the date of it, yet it is good enough. And if it is

^j *Carter v. Carter*, Mosley, 165.

^k *Perk. s. 137*; 9 H. 6, 37; 11 Co. 28; 3 Ib. 35.

^l *Shep. Touch. 57*.

^m *Dyer*, 167; *Perk. s. 137*; Co. Lit. 36; Co. 26; 5 Ib.

119.

ⁿ *Dyer*, 192.

delivered before the date, and one of the parties dies before the date, yet the deed is good; for though the party is estopped to plead the deed to be delivered before the date, yet the jury may say the truth^o. But if it be delivered before it be sealed, it is bad.

The delivery of a deed may be absolute and final, as Escrow. when it is delivered to the grantee himself, or his attorney, as a final and conclusive evidence of the contract; or conditional, in which case it is said to be delivered as an escrow or scrowl in writing, which is where a person makes and seals a deed and delivers it to a stranger until certain conditions be performed, and then, but not sooner, to be delivered to the grantee, to take effect as the deed of the grantor, in which case it is of no force as a deed till the condition be performed; and therefore, although the party to whom it is made, should sooner get it in his possession, yet it will avail him nothing until the condition be performed^p; but upon performance of the condition, the deed will (although either party be dead) have its proper operation, and take effect from the time of the first delivery, there being *traditio inchoata* previously, and *consummatio existens* afterwards^q. But in delivering deeds as escrows, two cautions must be observed^r. 1. That the form of words used in the delivery of a deed in this manner be apt and proper. 2. That the deed be delivered to one that is a stranger to it, and not to the party himself to whom it is made^s; for if it be delivered to the party himself, it will be an absolute delivery, notwithstanding it was delivered as an escrow, and upon condition, *in totidem verbis*, and consequently the party will not be bound to a performance of them^t. The words, therefore, to be used in

^o 2 Co. 4, b; Plow. 492.

^p Shep. Touch. 59.

^q Ibid.

^r Keilw. 88; Perk. s. 138, 140, 141, 142, 143, 144; 9 Co. 137; Co. Lit. 36, 48.

^s *Whyddon's case*, Cro. Eliz. 520; Ibid. 835, 884; Shep. Touch. 58.

^t Co. Lit. 36, a; 9 Co. 137, a.

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the delivery, must expressly and particularly mention the condition upon which it is made: as I deliver this to you as an escrow, to deliver to the party as my deed, upon condition that he do deliver to you 20*l.* for me, or upon condition that he deliver up the old bond he hath of mine for the same money, or as the case may be. For if it be general, as, I deliver this to you as my deed, and that you shall deliver it to the party upon certain conditions, without naming them; or, I deliver this to you as my deed, to deliver to him to whom it is made when he comes to London; in these cases, the deed takes effect presently, and the party is not bound to perform any of the conditions¹. So it must be delivered to a stranger; for if I seal the deed, and deliver it to the party himself to whom it is made as an escrow upon certain conditions mentioned, the delivery is absolute, and the deed shall take effect as his deed presently, and the party is not bound to perform the conditions. But where the deed is delivered to a stranger, and apt words are used in the delivery, it is of no more force until the conditions be performed, than if it had not been delivered at all². And when the conditions are performed, and the deed is delivered over, then the deed shall take as much effect as if it were delivered immediately to the party to whom it is made³, and no act of God or man can hinder or prevent its effect, if the party be, at the time, of capacity to make it⁴. He, therefore, that is entrusted with the keeping and delivery of such a writing, ought not to deliver it before the conditions be performed; and when the conditions are performed, he ought not to keep it, but to deliver it to the party. For it may be made a question, whether the deed be perfect, before he hath delivered it over to the party according to the authority given him. It should seem, however, that the delivery is good, for it is said in Coke, that if either of the parties to the deed die

¹ Shep. Touch. 58.² Ibid.³ Fitz. Facts and Feoffments, 13.⁴ 3 Co. 35.

before the conditions be performed, and the conditions be afterwards performed, that the deed is good; for there was *traditio inchoata* in the life-time of the parties; and upon the performance of the conditions, it takes effect by the first delivery, without any new or second delivery, which is but a consummation of the first^a(1).

But in case a delivery is merely void, and takes no effect, as where a feme covert seals and delivers a deed, and after her husband's death, delivers the deed again, in this case the deed is become good. So where a deed, originally good, becomes void by matter *ex post facto*, as by breaking the seal, or the like; if the party to the deed seal and deliver it again, the deed is become good again. Regularly, there cannot be two effective deliveries of a deed, for where the first delivery takes any effect at all, the second delivery is void. And therefore if an infant, or a man under duress of imprisonment, seal and deliver a deed, (in which cases the deed is not absolutely void, but only voidable^b;) and the infant after he becomes of full age, or the man imprisoned after he be at large, deliver the deed again, this second delivery is no confirmation of the deed, but is void^c. There is an exception, however, as to this necessity in respect of corporations, the seal alone of which being affixed, is deemed a sufficient signing, the

Second
delivery.

^a 5 Co. 84; 3 Ib. 35, 36.

^c Park, s. 154; and see
Co. Lit. 48.

(1) But "note, that albeit a writing or escrow, that is not sealed and delivered in manner as aforesaid, may not be used nor pleaded as a deed, yet it may serve and be used as an evidence and proof of the agreement contained therein. And whatsoever may be done by word without any writing, may much more and better be done by writing unsealed, or sealed, though it be not delivered as aforesaid." Shep. Touch. 58.

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seal representing the individual members^d; and so of the King's letters patent, and of grants from the Duchy of Lancaster, the seal in these cases being matter of record^e.

Attestation, &c.
by witnesses.

7. A further and last requisite to the validity of a deed is the attestation, or execution of it in the presence of witnesses: though this is necessary, rather for preserving the evidence, than for constituting the essence of the deed. Our modern deeds are in reality nothing more than an improvement or amplification of the *brevia testata* mentioned by the feudal writers^f; which were written memorandums, introduced to perpetuate the tenor of the conveyance and investiture, when grants by parol only became the foundation of frequent dispute and uncertainty. To this end they registered in the deed the persons who attended as witnesses, which was formerly done without their signing their names (that not being always in their power) but they only heard the deed read; and then the clerk or scribe added their names, in a sort of memorandum; thus, "*hijis testibus, Johanne Moore, Jacobo Smith, et aliis ad hanc rem convocatis*." This, like all other solemn transactions, was originally done only *coram paribus*^h, and frequently when assembled in the court-baron, hundred, or county court; which was then expressed in the attestation, *teste comitatu, hundredo, &c.*ⁱ. Afterwards the attestation of other witnesses was allowed, the trial in case of a dispute being still reserved to the *pares*, with whom the witnesses (if more than one) were associated and joined in the verdict^k: till that also was abrogated by the statute of York, 2 Edw. 2, st. 1, c. 2. And in this manner, with some such clause of *hijis testibus*, are all old deeds and charters, particularly *Magna Charta*, witnessed. And in the time of Sir Edward Coke,

^d *Wallis v. Jerwin*, Cro. Eliz. 167.

^e *Ibid.*

^f Feud. l. 1, t. 4.

^g Co. Lit. 7.

^h Feud. l. 2, t. 32.

ⁱ Spelm. Gloss. 228; Madox, Formul. No. 221, 322, 660.

^k Co. Lit. 6.

creations of nobility were still witnessed in the same manner¹. But in the king's common charters, writs, or letters patent, the style is now altered: for, at present, the king is his own witness, and attests his letters patent thus; "*teste meipso*, witness ourself at Westminster, &c." a form which was introduced by Richard the First^m, but not commonly used till about the beginning of the fifteenth century; nor the clause of *hijis testibus* entirely discontinued till the reign of Henry the Eighthⁿ, which was also the æra of discontinuing it in the deeds of subjects, learning being then revived, and the faculty of writing more general; and therefore, ever since that time the witnesses have usually subscribed their attestation, either at the bottom, or on the back of the deed^o.

We may now proceed to consider the several parts or members which we have observed are common to the species of deeds now in use, and then inquire more particularly into the peculiar nature and incidents of each species of deed in particular. These are, 1. The premises; 2. The *habendum*; 3. The *tenendum*; 4. The *red-dendum*; 5. The clause of warranty; and 6. The covenants.

The premises is properly all that part of a deed which precedes the *habendum*. But the word is sometimes used to signify exclusively the thing demised, or granted, by the deed; this is not, however, common. The office of this part of the deed is rightly to name the grantor and grantee, with their additions and titles, and to describe with certainty the thing granted, either by express words, or by that which by reference may be reduced to a certainty. In this part of the deed are also generally contained the exception, or thing to be excepted, and the recitals, if there be any, and the consideration upon which the deed is made.

1. Premises of a deed.

¹ 2 Inst. 77.

ⁿ Ibid. Dissert. fol. 32.

^o Madox, Formul. No. 515.

^o 2 Inst. 78; 2 Blac. Com. 307, 378.

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And here is also sometimes (though unnecessarily) set down the duration of the estate¹; and if the deed be by indenture, this part of the deed commences with mentioning the time of the transaction being performed; but if by deed-poll, it is usually mentioned at the end of the deed.

And as the generality of deeds are now made by indenture, I shall begin with this latter requisite, respecting the date of a deed.

The date of the deed is the time of its being signed, sealed and delivered by the parties, which is usually called the execution of the deed².

The necessary parties to a deed are, generally speaking, the persons from whom the subject of the grant or contract moves; the person to whom it moves; the person for whose use it is transferred or entered into; and the persons whose consent, by reason of their having an interest in the subject of the contract, is necessary to make it binding on the parties. All these parties should be described by their christian and surnames, their places of abode, and their occupations, in order to identify them, if required thereafter, as being the actual persons contracting. It is also usual and proper, as a further identification, to state the character, if any, which they sustain in the transaction, as heir at law, executor, devisee, or the like, of such an one deceased; and if either party be a corporation, it must be described by the situation of the place where its objects are performed, the name of the founder, its usual appellation, or so otherwise as to distinguish it from all other corporations of a similar kind³.

Naming
grantors, &c.

It is to be observed, that the names of persons at this day are only sounds for distinction sake, though it is probable that they originally imported something more, as some natural qualities, features, or relations of the person;

¹ Co. Lit. 6, 7; 11 Co. Fanshaw's case, Moor 51, 2; Ib. 55; Plow. 196. 235.

² See ante, p. 85.

but since they are now of no other use than to mark out the families or individuals spoken of, and to distinguish them from others, it is sufficient in grants, (which are to receive the most benign interpretation), if the parties be so described, as to render it apparent who is meant*. And where there are such sufficient marks of distinction, the grant will be good without any name at all; consequently a mistake in the name of baptism or surname, is to be looked upon but as surplusage, and will not vitiate the deed. Thus a grant by or to *George*, Bishop of Norwich, where his name is *John*, or to *Henry*, Earl of Pembroke, where his name is *Robert*, is good, if there be but one Bishop of Norwich or Earl of Pembroke'; for *nihil facit error nominis cum de corpore constat*.

So if a grant be made to a man and his wife, without naming her by the name of baptism, yet she shall take". So, if a grant be made to *T.* and *Elen* his wife, where in truth her name is *Emlyn*; yet the grant is good, for being called the wife of *T.* reduces it to a sufficient certainty". So the habitation of the wife is sufficiently shown by showing that of the husband'. So the place where a person is conversant is sufficient, though not *commorant* nor *inhabitant*".

And if there be father and son of the same name, and the father grant an annuity by his name, without any addition, it shall be intended the grant of the father; and if the son, being of the same name with his father, grant an annuity without any addition, yet the grant is good, for he cannot deny his own deed". So, in a devise, though the christian name be mistaken, yet if there be a sufficient specification of the party, the devise is good; because it must be construed according to the intent of the devisor; and therefore if a devise be made to *Abraham*, the eldest

* Co. Lit. 28, a.

* 2 H. 4, 25; 2 Rol. Abr.

* Co. Lit. 3, a; 2 Rol.

43; Co. Lit. 3.

Abr. 43; and see Perk. 36;

* 2 Hawk. P. C. c. 23,

2 Rol. Abr. 44.

s. 124.

* 46 E. 3, 22, b; Abr. 43.

* Barnes, 164.

cited.

* Perk. s. 37.

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son of *B.* where his name is *William*, this is a good devise.^b

A bastard who is known as being the son of such an one, may purchase, or be a grantee by such reputed name; for all surnames were originally acquired by reputation^c. So, a woman who hath gotten the reputation of being the wife of such an one, may be a grantee by that name, though in truth she was never married to him^d. As, where *George Shelley* conveyed lands to the use of himself, the remainder to *George Shelley* his son, whereas in truth *George* was born of one *B.* in matrimony of one *C.* yet was reputed the son of *George*, and educated by him; though the boy was but six years old, it was ruled he should take the remainder, for having gotten by reputation the name of *George Shelley*, these words are a certain description of the person to take the remainder^e. But if a remainder be limited to the eldest issue of *J. S.* whether legitimate or illegitimate, and *J. S.* have issue a bastard, he shall not take this remainder, for it is not in this case vested in *J. S.* as it was in the other case, but is in contingency, and the certain time is not defined when this contingency shall happen, for the bastard, at his birth, does not acquire the reputation of being the issue of *J. S.*; and since the bastard, when first in being, cannot take by virtue of this limitation, he can never take it; for he cannot be understood to be the person designed and marked out by these words, if after his birth it depends on the uncertainty of popular reputation, whether he should take the remainder, or not; and such a designation of the person as contains no certainty in itself, or no relation to any other certain matter that may reduce it to certainty, is a void limitation^f. But where a remainder is limited to the

^b Leon. 18.

^c Co. Lit. 3; 2 Rol. Abr. 2 Rol. Abr. 43, 44. See
43, 44. Mr. Hargrave's note upon

^d Hob. 32.

^e Co. Lit. 3, a.

^f *Blonwell v. Edwards*,
these cases in Co. Lit. 3, b.

eldest son of Jane S. whether legitimate or illegitimate, and she hath issue a bastard, he shall take this remainder, because he acquires the denomination of her issue by being born of her body, and so it never was uncertain who was designed by this remainder^s.

Also, if a grant be made to a father and his son, he having but one son, the grant is good for the apparent certainty of it; but if the father have several sons, or if a grant be made to a man's cousin or friend, these are void for uncertainty^b.

But it seems by the books to be the better opinion, that where there is no further addition to help out the defect, a mistake of the christian name of the person will vitiate the grant; as, where the grant is without any christian name at all, or where a wrong name is made use of, as *Edmund* for *Edward*^c.

Also, though a person cannot have two christian names at one and the same time, yet he may, according to the institution of the church, receive one name at his baptism, and another at his confirmation, and a grant made to or by him, by the name of confirmation, will be good; for though our religion allows no re-baptizing to make double names, yet it does not force men to abide by the names given them by their godfathers, when they come themselves to confirm their religion^d.

It has been already observed, that the naming of the right names of the grantor and grantee is for no other purpose but to ascertain the parties and distinguish them from others; and that if there be a sufficient verification to this purpose, the grant will receive the most favourable interpretation^e: and it seems the same indulgence will be

^s Noy, 35.

^b Cro. Jac. 374; Co. Cop. 95.

^c Vide 36 H. 6, 26; Dyer, 279; Owen, 107; Co. Lit. 3;

Cro. Jac. 558, 640; Perk. s. 38.

^d 46 Edward 3, 22, b; Co. Lit. 3; 2 Rol. Abr. 43; Brownl. 147; Lit. Rep. 182.

^e See Co. Lit. 28, a.

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allowed in the mistake of such additions as are by law made part of the name^m. The common law, indeed, required no other description of a person, than by his christian name and surname, unless he were of the degree of a knight or some higher dignity; in which case, the names of dignity were always required, being marks of distinction imposed by public authority, and therefore making up the very name of the person to whom they are givenⁿ. These are of two sorts: 1st, Such as exclude the surname, so that the persons may not seem to be of any common family, as earl, duke, &c. And 2dly, Such as, though parcel of the name itself, do not exclude the surname, as knight and baronet. As to those names of dignity which exclude the surname, we have already observed, that in grants, a mistake in the christian name will not vitiate the grant, because there cannot regularly be more than one person of that name^o. So a grant to a duke's eldest son, by the name of a marquis, or to the eldest son of a marquis, by the name of an earl, &c. is good, because of the common curtesy of England, and their places in heraldry^p.

Regularly, no person, not named in the premises of the deed, can take any thing by the deed, though he be afterwards named in the *habendum*, because it is the premises of the deed that makes the gift; and therefore, when the lands are given to one in the premises, the *habendum* cannot give any share of them to another, because that would be to retract the gift already made, and consequently to make a deed contrary and repugnant in itself^q; thus,

^m 2 Inst. 666; Dyer, 88; Skin. 651, pl. 1; *The King v. Bishop of Chester*, 5 Mod. 297; Show. 392.

ⁿ 2 Inst. 665; 2 Rol. Abr. 2 Salk. 560; 1 Lord Raym. 469; Show. 392; Comb. 335, S. C.; and see Lit. Rep. 189. 200, S. P.; Show. Parl. Ca. 224; 1 Mod. 187.

^o Co. Lit. 3.

^p Carth. 440; Lord Raym. 47, b; Hob. 275, 313; 2 292; and see *Lord Evers v. Strickland*, Bulst. 21; Rol. Abr. 65; Cro. Jac. 564; Cro. Eliz. 58.

for instance, if a charter of feoffment be made between *A.* of the one part, and *B.* and *C.* of the other part, and *A.* gives land to *B.* *habendum* to *B.* and *C.* and their heirs; *C.* takes nothing by the *habendum*, because all the lands were given to *B.*, and consequently *C.* cannot hold those lands which are given before to another; but in this case, if the *habendum* had been to *B.* and *C.* and their heirs, to the use of *B.* and *C.*, this had been a good limitation of an use, and consequently the statute would carry the possession to the use, and *B.* and *C.* thereby become joint-tenants^r. So if a deed of feoffment be made, without naming any feoffee in the premises, *habendum* to *B.* and his heirs, it seems doubtful whether *B.* shall take any thing by this gift; for though there is not that repugnancy in this case as in the former, the lands being given to nobody in the premises of the deed, and consequently the *habendum* cannot be said to be contrary to the premises, but rather explanatory in describing who shall hold the lands which were given in the premises; and for this reason Lord Coke holds^s, that the gift to *B.* is good; but by the opinion of others^t, the gift is void, because the *habendum* can only limit the duration of the estate, but no man can by virtue thereof hold lands which were not given to him. And, therefore, if lands be given to a husband, *habendum* to him and his wife, and to the heirs of their two bodies, the wife takes nothing, because she was not mentioned in the premises; and therefore shall take nothing of that which was before given entirely to her husband^u. But there are some exceptions, to this rule; as if lands be given to a man and woman in frank-marriage, the woman may take by the *habendum*, though she be not named in the premises; because the gift being totally on her account, it is necessary to

^r 13 Co. 53; Poph. 126.^s Co. Lit. 7, a.^t Cro. Eliz. 903; 2 Rol.^u 2 Rol. Abr. 67; and see Co. Lit. 26, b. n. (4).

Abr. 66, 67.

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the creation of the estate in the husband that the wife should take^{*}. Another exception is, in grants by copy of court-roll; as, if a copyholder surrenders to his lord, without limiting any use, and then the lord grants it in this manner, *J. S. cepit de domino, habendum* to the said *J. S.* and his wife, and the heirs of their bodies begotten, this is a good estate-tail in the wife; for these customary grants, which are made in pursuance of a former surrender, are construed according to the intention of the parties, as wills are; besides that, the custom of the manor is the rule for the exposition of such sort of grants, and in many manors this kind of form is usual[†]. Again, a man not named in the premises may take an estate in remainder by limitation in the *habendum*[‡]. Lastly, in wills; as, if a man devises lands to *J. S. habendum* to him and his wife, this is a good devise to the wife; because, in construction of wills, the intention of the devisor is chiefly regarded; and wherever that discovers itself, it shall take place, though it be not expressed in those legal forms that are required in conveyances executed in a man's life-time[§].

Description of
the thing
granted.

With respect to the certainty required in the description of the thing granted, all that it seems necessary to observe here, is, that it should be so fully and minutely described, as that it may evidently and indisputably appear to be that which was intended to pass by the grant, and no other; this is usually and most properly done by expressing the name, quality, quantity, situation, tenancy, &c. of the thing granted; and it is usual, for propriety sake, to name them in succession, according to their relative value or importance, as manors, bartons, messuages, &c.^b; but, says Lord

^{*} Co. Lit. 21; Plow. 158; [‡] 2 Rol. Abr. 68; Hob. Cro. Jac. 454; Poph. 126; 313; Cro. Jac. 56.
[†] 2 Rol. Abr. 67.

[‡] Poph. 125, 126; *Brook's* case, Cro. Jac. 434; 2 Rol. Abr. 67; *Downs v. Hopkins*, Cro. Eliz. 323.

^b Plow. 158, 414; 2 Rol. Abr. 68.

^b See Co. Lit. 6, a; and *post*, p. 107.

Hobart, "the very matter and substance of every grant being nothing else than a declaration of the owner's will to transfer a thing to another, if his intention appears to pass the thing, a slight mistake or error in the description will not vitiate the grant^c." Thus, where a grant was made of glebe lands, of tithes prædial and personal, and also of the tithe of the glebe, "all which late were in the occupation of Margaret Peto," which was not true, yet the grant was adjudged good; for the words, "all which," are not words of restriction, where the clause is distinct, but only when the clause is general, and the sentence entire^d. So, where *A.* granted and confirmed to *B.* a rent of 5*l.* to be taken out of his lands, "which rent *B.* has of the grant of his father;" though *B.* never had any such rent from his father, yet this grant shall be good, for it is evidently the intention of *A.* that *B.* shall have a rent of 5*l.* out of his land; and a mistake or error in the description of the thing referred to, shall not render the true design of the contract ineffectual and void^e.

But where the thing is not granted by an express name, and there is a falsity in the description of the thing, the grant is void; as if *A.* grant lands "lately let to *D.* in such a parish," and the lands were not let to *D.* and were also in another parish, the grant is void, because the lands are nowhere particularly named^f.

And if a grant be of a manor, and all advowsons thereunto appurtenant or belonging, this will not pass advowsons then severed from the manor, although formerly appendant^g.

But if a man lease his lands by a certain name, as Black-acre, "in the parish of Mary Loades, in the city of

^c Hob. 229.

73; 2 Rol. Abr. 425; and see Godb. 237.

^d Cro. Car. 548; 2 Mod.

^e 2 Mod. 3.

3, 4, cited Moor, 881, S.P. resolved.

^f *Rex v. Bp. of Durham*,

^g Bro. tit. "Grant," 69, Com. Rep. 361.

DEEDS. Gloucester," the land lying in Mary Loades shall pass, although it be not situated in the city of Gloucester, for there was a sufficient certainty before expressed^b. So if the lord license his copyholder for life to lease Blackacre in the tenure of *J. S.* for five years, and Blackacre is not in the tenure of *J. S.* but of the copyholder himself; yet this amounts to a good license, for the lands being particularly named, reduces it to a sufficient certainty¹.

And though a reputed manor consist of copyhold tenants only, without any freehold tenants, (without which in strictness it can be no manor), yet this being known by the name of a manor will pass by that name².

And a defect in the description of a thing may be aided by relation to a thing certain. As if a grant be made of such liberties as such a town enjoys, the grant is good, because capable of being reduced to a certainty; for when the act of disposal relates to another thing, that thing becomes in a manner part of the disposition: and the standard referred to being certain, the grant by relation to it becomes certain also, by the common maxim, *id certum est quod certum reddi potest*¹.

An uncertain grant may also, in some cases, be reduced to a certainty, by an election given to the grantee. As if *A.* seised of a great waste, grant the moiety of a yard-land lying in the waste, without ascertaining what part, or the special name of the land, or how bounded, this, unless in the case of the king) may be reduced to a certainty by the election of the grantee^m. So if a man grant twenty acres, parcel of his manor, without any other description of them, yet the grant is not void, for an acre is a thing

^b *Robinson v. Button*, 2 Rol. Abr. 52. *v. Thinne*, Sid. 190; Lev. 28; and see Co. Lit. 324, b.

¹ *Wollison v. Banbridge*, 2 Rol. Abr. 52; and see Co. Lit. 4; 2 Rol. Abr. 54. ¹ Hob. 174; Godb. 245; 2 Rol. Abr. 49.

^m Leon. 30; Noy, 29; 1 Co. 86. ² 2 Rol. Abr. 45; 6 Co. 66, b; Shep. T. 92; *Thinne*

certain, and the situation may be reduced to a certainty by the election of the grantee^a (1).

A good description of the subject of a grant may also in some cases be effected by the use of such general words and phrases, of which the legal acceptance may be sufficient to comprehend the subject of the grant; and hence it is necessary that the student should first make himself acquainted with the legal import and extent of the words usually employed in the description of the different kinds of property; as, manors or lordships, bartons, messuages, farms, lands, tenements, advowsons, tithes, rents, and hereditaments: but a consideration of these belongs rather to that part of the Elements which is appropriated to an inquiry concerning the *exposition* and *construction* of common assurances; in the mean time, the compilations cited below, will furnish the student with considerable information upon this point^c.

A recital is a statement of such deeds, agreements, or other circumstances, as are necessary to explain the reason upon which the present transaction is founded, and the nature of the title, and extent of the interest of the grantor. A recital is not, however, a necessary part of the deed of a common person, either in law or equity; nor has it in itself any effect or operation, but being joined, and considered with the rest of the deed, is of great use to explain a doubt of the intention and meaning of the parties, but as it is no direct affirmation, it is not conclusive^d; and

Recital in
deeds.

^a Keilw. 84; 2 Co. 36. c. 5, 12; Co. Lit. 6, a; 4 Cru.

^c See Com. Dig. "Grant," Dig. 39.
(E), Fait, (E. 4.); Bac. Abr. ^d Co. Lit. 352, b.
"Grants," I. 3; Shep. Touch.

(1) But the election in these cases must be made in the life-time of the parties, and cannot be made by the heir or executor. Co. Lit. 145, a; 2 Co. 37, a; Hob. 174; Leon. 254.

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therefore will not make an estoppel¹; but an action of covenant, it is said, will lie upon a recital².

But though a recital is not necessary in deeds made by common persons, yet when a man is to take any new estate from the king of a thing of which there is any estate in being, there the former estate, if it be good and of record, must be recited in the deed, or else the second grant will not be good³; but in case of a common person, there needs no such recital; neither when a man is to derive an estate out of a former, or assign over a term of years, is it needful there should be any recital of the former estate in being. It is, however, usual to recite, not only the contract of the parties, but also a deduction of title, from the last owner of the inheritance down to the present grantor, and which is more particularly proper where the title-deeds are not delivered over to the grantee, as it connects the present with the last estate conveyed, and enables the grantee to show a title not only in himself but in the person from whom he received it. And where such recital is made, it is necessary that it should be correct; for if one recite an estate made for a term of years, and afterwards grant over the term to another, and mistake in the recital, the mistake may, in some cases, vacate the whole grant. As, if I grant to *J. S.* all the lands in *Dale*, which I purchased from *I. D.* or which came unto me by descent from *I. D.*, and in truth I have no such lands, but I had them by some other means, or of some other person; in these cases, and by this mistake, the deed is void⁴.

Exceptions in
deeds.

An exception is a clause of a deed by which the feoffor, donor, grantor, lessor, &c. excepts something out of that which he had before granted by the deed⁵. And being

¹ Finch's Law, 33.

² Dyer, 50, 87, 376.

³ See *Graves v. White*, 2

⁴ Plow. 195, 361; Dyer,

Eq. Ca. Ab. "Portions," (C.)

59; Perk. s. 625; Co. Lit.

⁵ 1 Co. 45; Dyer, 77.

47.

the act and words of the feoffor, &c. it shall be taken against him *stricte*^a. An exception commonly and properly succeeds the description of the things granted. But it may be in any part of the deed⁷. By the exception the thing exempted is taken wholly out of the grant, and is no parcel of the thing granted: as if a manor be granted excepting one acre; by this exception, in judgment of law, that acre is severed from the manor.

To make an exception good, it must be, 1. By apt words. 2. It must be of part of the thing granted, and not of some other thing. 3. It must be of part of the thing only, and not of all, the greater part, or the effect of the thing granted. 4. It must be of such a thing as is severable from the thing which is granted, and not of an inseparable incident^a. 5. It must be of such a thing as properly belongs to him who excepts. 6. It must be of a particular thing out of a general, and not of a particular thing out of a particular thing, or of a part of a certainty. And 7. It must be certainly described and set down^a. As for examples: If a man grant all his lands in Essex, saving or except (1) his lands in Dale, or all his lands in Dale, excepting one house, or one acre in certain; or one house, excepting one chamber in certain; these and such like exceptions are good^b. And if one grant a manor, excepting one tenement (parcel of the manor), or excepting the services of I. S. (he holding of the manor), or excepting one close, or excepting one acre, or excepting the advow-

^a 10 Co. 106, b.

^a Shep. Touch. 77; *Dor-*

⁷ *B. R. Fregunel's case*, *rell v. Collins*, Cro. Eliz. 6.

Perk. s. 62, &c.

^b Plow. 195; Perk. s. 641.

^a Plow. 19; Co. Lit. 47.

(1) See distinction between a saving and an exception, in T. Raym. 359; Plowd. 361. An exception out of an exception, or a saving out of a saving, is good enough, and makes the thing as if it had never been excepted. *Leigh v. Shaw*, Cro. Eliz. 372.

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son appendant, or excepting the woods, or excepting twenty acres of wood, or excepting all the gross trees; these are good exceptions^c. And if one grant a messuage and houses thereunto belonging, excepting the barn, or excepting the dove-house; it seems that this is a good exception, for they may pass by the grant of a messuage, &c.^d So if there be a grant of land, excepting the trees thereupon; or of a wood, excepting twenty of the best oaks, naming them in certain; these are good exceptions^e. And if one grant a messuage, and all the lands and tenements thereunto belonging, excepting one cottage; this is a good exception^f. And if one grant a reversion, excepting the rent; this is a good exception of the rent, and prevents it from passing by the grant. So if man have a rent-charge out of land, and he release his right in the land, except the rent; this is a good exception^g. But if the exception be of another thing than the thing granted; as if one grant a manor or land, excepting twelve pence, or excepting the tithes, these exceptions are void^h. Or if the exception be such as to be repugnant to the grant, and tends to subvert it, and take away the fruit of it, as if one grant a manor or land to another, excepting the profits; or make a feoffment of a close of meadow or pasture, reserving or excepting the grass; or grant a manor, excepting the services; or two acres, excepting one of them, these are void exceptionsⁱ. An exception is also void, if it be of an inseparable incident and a thing that cannot be granted by itself; as if a manor be granted, excepting the court-baron; or land be granted, excepting the common

^c Dyer, 103; Plow. 104, 361, 367; 8 Co. 63, b; Ib. 47; 5 Ib. 11; Perk. s. 642.

^d 14 Hen. 8, 1.

^e 8 Co. 63

^f 11 Co. 64.

^g Perk. s. 113, 644; Dyer, 157.

^h Perk. s. 639; Dyer, 59; Plow. 361, 367, 370.

ⁱ Dyer, 97, 264; Co: Lit. 47; Plow. 103, 104, 153; Doct. and Stud. 98; Dyer, 59.

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appendant^k. So if the exception be of a particular thing out of a particular thing; as if one grant white acre and black acre, excepting white acre; or grant twenty acres of land by particular names, excepting one acre of them; these exceptions are void^l. So if the exception be set down uncertainly; as if one grant a house excepting one chamber; or grant a manor, excepting one acre; without specifying which chamber, or which acre it shall be; the exceptions will be void^m.

2. Of the *habendum* in deeds.

The habendum of a deed, is that part of it which begins with, TO HAVE AND TO HOLD, and properly follows the premises. The office of the habendum, is so set down again the name of the grantee, the estate that is to be made and limited, or the time that the grantee shall have in the thing granted or demised, and to what useⁿ; though this may be and frequently is done in the premises. And herein also is sometimes, though unnecessarily, repeated, the thing granted: as it is sufficient if it be named in the premises, because it is the premises that make the gift, and the habendum does of its own nature refer to the things mentioned in the premises^o. The habendum cannot, therefore, pass any thing that is not expressly mentioned or contained by implication in the premises of the deed; because the premises being part of the deed by which the thing is granted, and consequently that which makes the gift, it follows that the habendum, which only limits the certainty and extent of the estate in the thing given, cannot increase or multiply the gift, because it were absurd to say, that the grantee should hold a thing which was never given to him^p. Hence it is, that if a man grant a manor, to hold together with another manor, or

Habendum in deeds.

^k Co. Lit. 150.

^l Co. Lit. 47; Plow. 53.

^m Perk. s. 641, 643.

ⁿ Co. super Lit. 6, 7, 10,

107, and 26, b. n. (4).

^o 2 Co. 55, a; 9 Co. 47;

Co. Lit. 6.

^p 2 Rol. Abr. 65.

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with the advowson of another manor, only the manor granted in the premises shall pass¹. But if a private person grants a manor to hold together with an advowson, which belongs to the manor, this is a good conveyance of the advowson, because it was impliedly given by the gift of the manor itself².

We have said, that the estate intended to be granted is sometimes mentioned in the premises: when this is the case, the habendum may alter or abridge, enlarge or explain, the gift in the premises; but if it is repugnant and contrary to the premises, it is void, and shall be rejected; because the rule in the interpretation of all deeds is, that they shall be taken most strongly against the grantor; and therefore he shall not be allowed, by any subsequent part of the deed, to contradict or retract that gift which he made in the premises: thus, if a man give lands to J. S. and his heirs, habendum to him for life, this is a void habendum, because repugnant to the premises³.

But though the habendum cannot retract the gift in the premises, yet it may construe and explain in what sense the words in the premises shall be taken; for it is upon a view of the whole deed, that the intent of the parties must be collected: therefore, if lands be given to a man and his heirs, to hold to him and the heirs of his body, this is but an estate-tail; because the habendum only expounds the general word "heir" in the premises, and such exposition is consistent, and does not destroy the operation of the words mentioned in the premises, but only explains in what sense they are to be taken, and what heirs are comprehended⁴.

And if the grant had been to him and his heirs, to hold to him for his life, and the lives of three others; this

¹ 2 Rol. Abr. 65.

² Ibid.

³ *Baldwin's case*, 2 Co.
23.

⁴ 8 Co. 154, b; Co. Lit.
21, a; Lit. Rep. 345; and
see *Pilsworth v. Pyett*, 2
Jon. 4; 2 Keb. 865, S.C.

would likewise be a good *habendum*, because it does not render the word "heirs" in the premises useless, but expounds them only to create a special occupancy, and thereby to prevent the determination of the estate by the death of the grantee².

But if the grant in the premises be to a man and his heirs, to hold for the life of the grantee, this is a void *habendum*, because it totally defeats the operation of the word "heirs" in the premises; and, consequently, is repugnant and not explanatory, and is therefore void³.

Again, if a man make a feoffment in fee of twenty-one acres to A. and B. *habendum* one moiety to A. and the other moiety to B. this is good, and the *habendum* makes them tenants in common; for though the premises be joint, and therefore of themselves would operate to give a joint-estate and possession, yet the *habendum* explaining the manner of possessing is not inconsistent or repugnant, because it makes no division of that undivided possession which was given in the premises⁴. But if the *habendum* had limited ten acres to A. and the other ten acres to B. this had been void, because the *habendum*, in this case, contradicts and is repugnant to the premises; for by the premises, the entire and undivided possession of the whole twenty acres is equally given to both; and therefore the *habendum* that excludes A. out of his share of ten acres, and B. out of his share of ten acres, is contradictory to the premises, and therefore void⁵.

3. The next formal part of the deed is the *tenendum*. *Tenendum* in deeds. This is now, however, of very little use, being only inserted by custom: it was formerly used to signify the tenure by which the estate granted was to be holden, viz. *tenendum per servitium militare, in burgagio, in libero soccagio, &c.*; but all these being reduced by statute 12 Car. 2, c. 24, into

² *Boyles v. Poor*, Bulst. 183, b; 190, b, 13th edit.; 135, 136; Cro. Jac. 282. Hob. 172.

³ 2 Co. 23, 24.

⁴ Hob. 172.

⁵ Co. Lit. 180, b, n. (1).

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free and common soccage, the tenure is now never specified. Before the statute of *quia emptores*^a, it was also sometimes used to denote the lord of whom the land should be holden; but that statute directing all future purchasers to hold not of the immediate grantor, but of the chief lord of the fee, this use of the *tenendum* has also been antiquated; though, for a long time after, we find it mentioned in ancient charters, that the tenements shall be holden *de capitalibus dominis feodi*^b; but as this expressed nothing more than the statute had already provided for, it gradually grew out of use^c.

Reservation or
reddendum in
deeds.

4. Of the *reddendum* or reservation.

A reservation is a clause in a deed by which the feoffor, donor, lessor, grantor, &c. reserves some new thing to himself out of the thing granted. And this commonly, and properly, succeeds the *tenendum*, and is made by one or more of these words, "rendering, reserving, paying," or the like^d. This differs from an exception, inasmuch that an exception is ever of part of the thing granted, and of a thing *in esse* at the time: but a reservation is of a thing newly created or reserved out of a thing demised that was not *in esse* before; so that this always reserves that which was not before, or abridges the tenure of that which was before^e.

In every good reservation there must be these requisites: 1. It must be by apt words. 2. It must be of something issuing, or coming out of the thing granted, and not a part of the thing itself, nor of something issuing out of another thing. 3. It must be of such a thing to which the grantor may have resort to distrain. And 4. It must be made to one of the grantors, and not to a stranger to the deed^f. Thus, for examples: If a man grant land,

^a 18 Ed. 1.

^b See *Mad. Form. Angl.*

^c 2 *Blac. Com.* 298.

^d 10 *Co.* 107; *Plow.* 132;

Co. Lit. 47; and see 143, n.

(1); *Perk.* s. 625.

^e *Shep. Touch.* 78.

^f *Plow.* 13; *Perk.* s. 626;

8 *Co.* 78; *Shep. Touch.* 80.

yielding and paying money or some such like thing yearly; this is a good reservation⁵. But if the grantee covenant to pay such a sum of money, or to do such a thing yearly; this is no good reservation, but a covenant to pay a sum of money in gross, and not as a rent. If a lease be made for years, rendering a rent to the lessor or his heirs, in the disjunctive; or rendering a rent to the lessor, without saying "and his heirs, &c." or rendering a rent during the said term, without saying to whom; or rendering 10 *l.* to the lessor, and 5 *l.* to his heirs; all these reservations are good. But if a lease be made, rendering rent to the heirs of the lessor; this reservation is void, because the rent is not reserved to himself first¹. If one grant land, yielding for rent, money, corn, a horse, spurs, a rose, or any such like thing; this is a good reservation: but if the reservation be of the grass, or of the vesture of the land, or of a common, or other profit to be taken out of the land; these reservations are void¹. If one grant a manor, messuage, land, meadow, or pasture, or the vesture or herbage of land, meadow, or pasture, rendering a rent; this is a good reservation¹. But if one grant tithes, rents, commons, advowsons, offices, a corody, mulcture of a mill, a fair, market, privilege, or liberty, reserving a rent; this reservation, unless in case of the king, is void².

Also, one may reserve one rent one year, and another rent another year; as 10*s.* one year, and 20*s.* another year: or one may reserve a rent to be paid every second, or third year, and no rent the other years; or one kind of rent one year, and another kind of rent another year.

And if the reservation be of the rent to a stranger who is no party to the deed, and to him only, this reservation is void. And so, if the father and his son and heir

⁵ Plow. 132; *Athone v. Hemings*, 1 Rol. Abr. 80; ¹ Co. Lit. 142. ² Ibid. 47; 5 Co. 3; Perk. s. 626.
² Bulst. 281, S. C. ¹ 5 Co. 111; 8 Ib. 71; ² Ibid. Lit. 99, 213, 214.

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apparent, by indenture, lease his land for years, to begin after the father's death, rendering rent to the son, it is void¹.

Condition.

Another of the terms upon which a grant may be made, is a condition; which is a clause of contingency, on the happening of which, the estate granted may be defeated; as "provided always, that if the mortgagor shall pay the mortgagee 500*l.* upon such a day, the whole estate granted shall determine;" and the like. But this has already been sufficiently considered^m.

Clause of warranty.

5. Next may follow the clause of warranty; whereby the grantor, for himself and his heirs, warrants and secures to the grantee the estate granted. This warranty is defined by Coke to be a covenant real annexed to lands or other tenements, whereby a man and his heirs are bound to warrant the same to the grantee and his heirs; and in case of eviction, to yield other lands or tenements of equal valueⁿ.

Warranty may be either express or implied: an express warranty is when the land is expressly warranted by words, as "I and my heirs warrant to A. and his heirs;" and the like. An implied warranty arises from the legal force of particular deeds, or other words than the word warrant, implying a guarantee of the lands to the grantee^p. The doctrine of warranty was formerly one of the most interesting and useful articles of legal learning; but their effect and operation having, by various acts of the legislature, been reduced to a very narrow compass, it is become in most respects a matter of speculation rather than of use. In some instances, however, warranties have still a powerful influence on our landed property; and there is no part of our jurisprudence to which the ancient writers have more frequently recourse to explain and illustrate their legal

¹ Hobart's Rep. 274; 47, a; 383, b; 384, a, b; *Oates v. Fith*, 3 Co. 1. 385, b; and see 4 Cru. Dig.

^m Book ii. part ii. c. 5.

50.

ⁿ Co. Lit. 365, a.

^p Co. Lit. 384, a.

^o Lit. s. 773; Co. -Lit.

doctrines. Hence abstruse, and in most respects obsolete, as the learning respecting it unquestionably is, it continues to deserve the attention of every person who wishes to obtain accurate notions of those branches of our laws, which are more immediately connected with the doctrines that respect the alienation of landed property (1).

By the feudal constitution, if the vassal's title to enjoy the feud was disputed, he might vouch or call the lord or donor, to warrant or insure his gift; which if he failed to do, and the vassal was evicted, the lord was bound to give him another feud of equal value in recompence¹. And so, by our ancient law, before the statute of *quia emptores*, if a man enfeoffed another in fee, by the feudal verb *dedi*, to hold of himself and his heirs by certain services, the law annexed a warranty to this grant, which bound the feoffor and his heirs, to whom the services (which were the consideration and equivalent for the gift) were originally stipulated to be rendered². So in an exchange of lands between parties, the word exchange imports a warranty to each by the other of the lands given in exchange³. Or if a man and his ancestors had immemorially holden land of another and his ancestors by the service of homage (which was called *homage auncestrel*) this also bound the lord to warranty⁴; the homage being an evidence of such a feudal grant. And, upon a similar principle, even at this day, in case, after a partition (or

¹ Feud. l. 2, t. 8, and 25.

² Co. Lit. 384; and hence trustees are frequently reluctant, by the advice of their counsel, to convey by the word "grant;" but it is now

agreed, that this word implies a warranty in respect of chattel interests only. Co. Lit. 384, n. (1).

³ Co. Lit. 384, n. (1.)

⁴ Lit. s. 143.

(1) See Co. Lit. 365, a. n. (1), 373, b. n. (2); where, and in the notes immediately subsequent, a very learned and minute investigation is given of the doctrine of warranty. See also Gilb. Ten. 132; and 2 Blac. Com. 300.

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exchange) of lands of inheritance, either party or his heirs be evicted of his share, the other and his heirs are bound to warranty^a, because they enjoy the equivalent. And so, upon a gift in tail or lease for life, rendering rent, the donor or lessor and his heirs (to whom the rent is payable,) are bound to warrant the title^a. But in a feoffment in fee by the verb *dedi*, since the statute of *quia emptores*, the feoffor only is bound to the implied warranty, and not his heirs^b; because it is a mere personal contract on the part of the feoffor, the tenure (and of course the ancient services) resulting back to the superior lord of the fee. And in other forms of alienation, gradually introduced since that statute, no warranty whatsoever is implied^c; they bearing no sort of analogy to the original feudal donation. And therefore, in such cases, it becomes necessary to add an express clause of warranty, to bind the grantor and his heirs; which is a kind of covenant real, and can only be created by the verb *warrantizo*, or warrant^a.

These express warranties were introduced, even prior to the statute of *quia emptores*, in order to evade the strictness of the feudal doctrine of non-alienation without the consent of the heir. For, though he, at the death of his ancestor, might have entered on any tenements that were aliened without his concurrence, yet, if a clause of warranty was added to the ancestor's grant, this covenant descending upon the heir insured the grantee; not so much by confirming his title, as by obliging such heir to yield him a recompence in lands of equal value: the law, in favour of alienations, supposing that no ancestor would wantonly disinherit his next of blood^b; and therefore presuming that he had received a valuable consideration, either in land, or in money which had purchased land, and that this equivalent descended to the heir together with the ancestor's warranty. So that when any ancestor, being the rightful

^a Co. Lit. 174, 384, a.^a Ibid. 384, a, b.^b Ibid.^a Ibid. 102.^a Lit. s. 783.^b Co. Lit. 373.

tenant of the freehold, conveyed the land to a stranger and his heirs, or released the right in fee-simple to one who was already in possession, and superadded a warranty to his deed, it was held that such warranty not only bound the warrantor himself to protect and assure the title of the warrantee, but also bound his heir: and this might be either lineal with or collateral to the title of the land. Lineal warranty was where the heir derived, or might by possibility have derived, his title to the land warranted, either from or through the ancestor who made the warranty: as, where a father, or an elder son in the life of the father, released to the disseisor of either themselves or the grandfather, with warranty, this was lineal to the younger son^c: the effect of which lineal warranty, was, 1st, to bar or rebut the warrantor and his heirs from ever claiming the lands again; 2ndly, in case the warrantee were evicted by title paramount, for the warrantor, if living, to give to him other lands of equal value, and if not, then it bound his heir to do the like in case he had assets, *i. e.* lands of equal value vested in him in possession, and descending from the common ancestor^d. Collateral warranty was where the heir's title to the land neither was, nor could have been, derived from the warranting ancestor; as if a father disseised his son of lands purchased by him, and aliened them with warranty to another, this would be a collateral warranty; for although the son be lineal heir to his father, yet as he does not derive his title from him, the warranty is said to be collateral^e. So where a younger brother released to his father's disseisor, with warranty, this was collateral to the elder brother^f; and yet it was equally a bar to the heir, and equally imposed upon him the obligation (having assets) of giving other lands of equal value

^c Lit. s. 703, 706, 707.^e Lit. s. 704.^d Co. Lit. 374, a; Fitz.^f Lit. s. 705, 707.

N. B. 134; 1 Co. 1.

^s 2 Blac. Com. 301.

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in case of eviction. But where the very conveyance, to which the warranty was annexed, immediately followed a disseisin, or operated itself as such (as, where a father, tenant for years, with remainder to his son in fee, aliened in fee-simple, with warranty), this being, in its original, manifestly founded on the tort or wrong of the warrantor himself, was called a warranty commencing by disseisin; and, being too palpably injurious to be supported, was not binding upon any heir of such tortious warrantor^a, unless where he neglected to enter during the life of the person aliening; in which case (by analogy to the case of a disseisor, &c. dying in possession of the estate) the law supposed that the remainder-man, or reversioner, would have entered for the forfeiture of the tenant for life, or years, if an equivalent had not been given him; it was therefore presumed, that if the heir did not enter during the life of such particular tenant, he had received from him an equivalent; and this presumption being admitted, he could not afterwards, with any colour of justice, be allowed to claim the estate himself¹.

In both lineal and collateral warranty, we have seen, that as the obligation of the heir, in case the warrantee was evicted, to yield him other lands in their stead, was only on condition that he had other sufficient lands by descent from the warranting ancestor^b; but though, without assets, he was not bound to insure the title of another, yet, in case of lineal warranty, whether assets descended or not, the heir was perpetually barred from claiming the land himself; for, if he could succeed in such claim, he would then gain assets by descent (if he had them not before) and must fulfil the warranty of his ancestor: and the same rule was with less justice adopted also in respect of collateral warranties¹, which likewise (though

^a Lit. s. 698, 702.^b Co. Lit. 102.¹ And see Gilb. Ten. 143, 168.¹ Lit. s. 711, 712.

no assets descended) barred the heir of the warrantor from claiming the land by any collateral title; upon the presumption of law that he might hereafter have assets by descent either from or through the same ancestor. The inconvenience of this latter branch of the rule was felt very early, when tenants by the curtesy took upon them to alien their lands with warranty; which collateral warranty of the father descending upon his son (who was the heir of both his parents), barred him from claiming his maternal inheritance: to remedy which, the statute of Gloucester, 6 Edw. 1, c. 3, declared, that such warranty should be no bar to the son, unless assets descended from the father^a. It was afterwards attempted, in 50 Edw. 3, to make the same provision universal, by enacting, that no collateral warranty should be a bar, unless where assets descended from the same ancestor^a; but it then proceeded not to effect. However, by the statute 11 Henry 7, c. 20, notwithstanding any alienation with warranty by tenant in dower, the heir of the husband is not barred, though he be also heir to the wife^c. And by statute 4 & 5 Anne, c. 16, s. 21, all warranties by any tenant for life shall be void against those in remainder or reversion; and all collateral warranties by any ancestor who has no estate of inheritance in possession shall be void against his heir. By the wording of which last statute, it should seem, that the legislature meant to allow, that the collateral warranty of tenant in tail in possession, descending (though without assets) upon a remainder-man, or reversioner, should still bar the remainder or reversion. For though the judges, in expounding the statute *de donis*, (the object of which was, to secure the estate to the issue in tail, and the reversion to the donor^d;) held that, by analogy to the statute of Gloucester, a lineal warranty by the tenant in tail without

^a And see 1 Inst. 365, a;
2 Ib. 291.

^a Co. Lit. 373.

^c And see *Lincoln College*
case, 3 Co. 58.

Lit. s. 708; Gilb. T. 142.

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assets should not bar the issue in tail, yet they held such warranty with assets to be a sufficient bar¹: which was therefore formerly mentioned, as one of the ways whereby an estate-tail might be destroyed; it being indeed nothing more in effect, than exchanging the lands entailed for others of equal value. They also held, that collateral warranty was not within the statute *de donis*; as that act was principally intended to prevent the tenant in tail from disinheriting his own issue; by declaring, that the will of the donor should be observed; and collateral heirs do not take by the gift of their ancestor²; and therefore, collateral warranty (though without assets) was allowed to be, as at common law, a sufficient bar of the estate-tail and all remainders and reversions expectant thereon³. And so it still continues to be, notwithstanding the statute of Queen Anne, if made by tenant in tail in possession: who therefore may now, without the forms of a fine or recovery, in some cases, make a good conveyance in fee-simple, by superadding a warranty to his grant; which, if accompanied with assets, bars his own issue, and without them bars such of his heirs as may be in remainder or reversion⁴. Thus, if tenant in tail, having three sons, discontinue the estate-tail in fee, and the second son release with warranty to the disseisee, and die without issue, such warranty will bar the eldest son, who cannot make a title to the second son under the intail, which makes the warranty collateral⁵: and with respect to remainders expectant upon estates-tail, there is nothing in the statute *de donis*, directly or indirectly to restrain the tenant in tail from barring his issue by warranty⁶.

Let us suppose, then, the common case of a limitation to the first and other sons successively in tail male; if the

¹ Lit. s. 712; 2 Inst. 293.

² Gilb. Ten. 142, 145.

³ Co. Lit. 374; 2 Inst.

335.

⁴ 2 Blac. Com. 303.

⁵ Lit. s. 708 to 716.

⁶ Sym's case, 8 Co. 51, b;
Boll v. Horton, Vaugh. 360.

first son, when in possession, levy a fine, this will be a discontinuance of the remainders to the other sons; and by reason of the warranty contained in the concord, it is a bar to them, even without assets: and it will be the same, if he execute a feoffment, accompanied by a warranty⁷.

But we are to observe, that a warranty never extends to bar any estate, either in possession, remainder, or reversion, unless either before, or at least at the time when the warranty is made, the estate is divested or displaced⁸.

Hence warranties are, in general, inserted in the deed of feoffment, and in fines, but seldom in any other conveyance; for bargains and sales enrolled (where the estate of the bargainee arises out of the estate of the bargainor by way of use) leases and releases, or the like, being in the nature of mere grants, have not the effect of working a discontinuance, so as to convert the legal estate into a right.

After warranty usually follow *covenants*, or conventions, Of covenants. which are "clauses of agreement contained in a deed, whereby either party may stipulate for the truth of certain facts, or may bind himself to perform, or give something to the other⁹." Thus, the grantor may covenant that he hath a right to convey; or for the grantee's quiet enjoyment; or the like: the grantee may covenant to pay his rent, or keep the premises in repair, &c. If the covenantor covenants for himself and his heirs, it is then a covenant real, and descends upon the heirs; who are bound to perform it, provided they have assets by descent, but not otherwise: if he covenants also for his executors and administrators, his personal assets, as well as his real, are likewise pledged for the performance of the covenant; which makes such covenant a better security than any warranty. It is also in some respects a less security, and therefore more beneficial to the grantor, who usually covenants only for the acts of himself and his ancestors,

⁷ Co. Lit. 373, b, n. (2).

⁸ And see 1 Saund. Rep.

⁹ *Seymour's case*, 10 Co 320, n; Sug. Vend. & Pur. c. 12.

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Hence, therefore, and as covenants generally form a material part of every modern conveyance, it will be proper to consider briefly, 1. How they may be created, whether by express words, or operation of law: 2. Their effect in binding the representatives of the covenantor: 3. How they shall be construed with respect to their intent: 4. What shall be a breach of covenant: and 5. How a covenant may be destroyed or extinguished.

Covenants may be expressed or implied; *i. e.* a stipulation expressly entered into by the party, *totidem verbis*, or implied in some forcible word made use of by him, amounting to a covenant by intendment of law. A stipulation, in order to operate as a covenant express, must be by or contained in some deed in writing under the seal of the covenanting party^a, but which deed may be either by deed-poll or indenture^b, and must be made to or with some person who is party to the deed, if by indenture, and if by deed-poll, by some person named in it^c, who by accepting of the deed, will have the benefit of, and be bound by, the stipulation^d.

By what words
an express
covenant may
be created.

There is no set form of words absolutely necessary to be made use of in creating an express covenant^e; and therefore it seems that any words will be effectual for that purpose, which show the parties concurrence to the performance of a future act; as, if lessee for years covenants to repair, with a proviso and it is agreed that the lessor shall find great timber, &c. this makes a covenant, on the part of the lessor, to find great timber, by the word

^a *Harwood v. Hilliard*, 2 Mod. 268.

^b 1 Rol. Abr. 517; Fitz. N. B. 145.

^c *Green v. Horne*, 1 Salk.

197.

^d Co. Lit. 231, a.

^e 1 Chan. Ca. 294; Leon. 324; 1 Burr. 290; Doug. 764.

"agreed," and it shall not be a qualification of the covenant of the lessee. A party may also covenant in respect of past transactions^f. So he may covenant as to time present; for it is the constant language of deeds of alienation, that the grantor has lawful power to convey^g. But it is said, that without the word "agreed," it would have been only a qualification of the covenant of the lessee^h. So, if A. lease to B. for years, upon condition that he shall acquit the lessor of ordinary and extraordinary charges, and shall keep and leave the houses at the end of the term in as good plight as he found them; this, though in the form of a condition, amounts to a covenantⁱ.

And every agreement, if it is by a deed, is a covenant^k. And where the words were only by way of recital, as that it was intended that a fine should be levied, &c. it makes no difference^l. So, where a man assigns a chose in action, though nothing passes at law, yet it amounts to a covenant that the other shall have the thing^m.

These express covenants are obligatory upon the covenantor in every event, and in every state and condition of the thing which is the subject of the covenant. In which they differ from those (to be hereafter noticed) which are implied by operation of law: for when the law creates a duty, and the party is disabled to perform it without any default in him, the law will excuse him; but, when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, notwithstanding an accident by inevitable necessity. Hence, a lessee, who covenants generally to pay rent, or to repair, is bound to the performance of his covenant, notwithstanding the

^f Plowd. 308.

^g Wooddes. 86; Rol. Abr. 518; Brownl. 23, S. C.

^h 1 Rol. Abr. 518; 2 Co. 72.

ⁱ 40 Edward 3, 5, b; 1 Rol. Abr. 518, S. C.

^j 1 Rol. Abr. 518, 519; *Harwood v. Hilliard*, 2 Mod. 268.

^k 2 Mod. 89, 91; 2 Freem. 3, S. C.; and see Leon. 122.

^l Mod. 113; 3 Keb. 304; Freem. 268; 1 Lord Raym. 683; 2 Lord Raym. 1242, 1419; 2 Blac. Rep. 820.

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premises may be destroyed by an accidental fire^a. So, on a covenant to build a bridge in a substantial manner, and to keep it in repair during a certain time, the party is bound to rebuild the bridge, though broken down by an extraordinary flood^c. And with respect to express covenants, equity follows the law; therefore, where no equitable circumstances arise, it will not relieve against them, on account of the destruction of the value of the subject by a subsequent accident. A tenant covenanting to repair, (damage by fire only excepted,) continues liable in equity, therefore, as well as at law, to the payment of the rent, notwithstanding the premises are destroyed by fire; for the equity of the parties being equal, the rule of law must prevail^d.

Of covenants
created by im-
plication of law.

As to implied covenants, we are to observe, that there are some words, which, though they import no express covenant of themselves, yet being made use of in certain contracts, they amount to such, and are therefore called covenants in law, and will as effectually bind the parties, as if expressed in the most explicit terms^e. As if a man make a lease for years of land, by the words "grant or demise," these import a covenant^f; and if the lessee or his assignee is evicted, they will support an action (1). So

^a See 1 Fonb. Eq. 370, ^f *Hare v. Groves*, Anstr. n. (3). 687.

^c *Bullock v. Dommitt*, 6 ^e 48 Edward 3, 2, b. 7; Term Rep. 650; *Brecknock*, Rol. Abr. 519. &c. *Navigation Company v. Pritchard*, Id. 750. ^f 5 Co. 17, a. resolved.

(1) The difference between an implied and an express covenant is, that in order to create an implied covenant, there must be some consideration moving to the covenantor to support it; but an express covenant will bind without consideration. Amb. 250; 3 Burr. 1639. An implied covenant will also be controlled by an express covenant; so that although the word may amount to a warranty or absolute guarantee, yet if the covenants contained in the deed be qualified, the obligation of the party shall not be held to extend beyond the covenants as expressed. *Noke's case*,

4 Co.

if an assignment be made by the word "grant". So if a man grant a lease for years, reserving rent, an action of covenant lies for non-payment of rent, for the *reddendum* of the rent is an agreement for payment of the rent, which will make a covenant¹. So, the words "yielding and paying" make a covenant². Also, if a man lease for years by the words "demise, grant, &c." these words amount to a covenant for enjoyment by the lessee³. But if a man lease for years by the words "demise, &c." and the lessor covenants that the lessee shall enjoy during the term, without eviction by the lessor, or any claiming under him; this express covenant qualifies the generality of the covenant in law, and restrains it by the mutual consent of both parties, that it shall not extend further than the express covenant⁴.

But if a man lease goods, or the like, for years by indenture, from which the grantee is evicted within the term, he shall not have a covenant; for the law does not create any covenant upon the grant of things of a personal nature⁵ (1).

¹ 2 Rol. Rep. 399; Palm. 2 Mod. 292; Vent. 10; 2 388; Carth. 98, S. P. admitted. Jones, 102; 3 Lev. 155.

² 4 Co. 80, b, *Nokes v. James*, adjudged. ³ 4 Co. 80; Cro. Eliz. 674; Yelv. 178.

⁴ Style, 406, 407, 431; 2 Brownl. 215; Sid. 266, 401; 519. ⁵ Owen, 104; 1 Rol. Abr.

4 Co. 80, b; 1 Mod. 113; 1 Ves. 101. So a covenant express will bind the representatives of the party; but if the covenant be implied only, neither the heir, (*Barber v. Fox*, 2 Saund. 136), nor executor will be bound. *Swan v. Searle*, Moor, 75; *sed quare*; and see Gilb. on Cov. 327; *Porter v. Sweetman*, Sty. 407.

(1) And therefore, in case of a lease of a house, together with the goods, it is usual to make a schedule of them, and affix it to the lease, and insert a covenant from the lessee to re-deliver them at the end of the term; for without such covenant the lessor can have no remedy but *trover* or *detinue* for them after the lease is ended.

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Covenants are again divided into real and personal. A real covenant is where the subject of the covenant has relation to land or other real property; a personal covenant is where the subject of covenant has relation to the person only of the covenantor; and the difference in point of effect between them is, that a real covenant is, as it were, agreed to and will be transferable, or as it is usually termed, run with the land to which it relates, and consequently will be binding upon all persons who, for the time being, may be possessed of it; and who, on the other hand, will also be entitled to the benefit of it^b.

Covenants of which the heir, &c. may take advantage.

If a man lease for years, and the lessee covenant with the lessor, his executors and administrators, to repair, and leave it in good repair at the end of the term, and the lessor die, &c. his heir may have an action upon this covenant: for this is a covenant that runs with the land, and shall go to the heir though he is not named; and it appears that it was intended to continue after the death of the lessor, inasmuch as his executors, &c. are named^c. But if the lessor were only tenant for life, a lease for years made by him, absolutely determines upon his death, and the heir cannot take advantage of the covenants in the demise^d.

The assignee of a term is bound to perform all the covenants annexed to the estate; as if *A.* leases lands to *B.* and *B.* covenants to pay the rent, repair houses, &c. during the said term, and *B.* assigns to *J. S.* the assignee is bound to perform the covenants though the assignee be not named, because the covenant runs with the land, being made for the maintenance of a thing *in esse* at the time of the lease made^e. And when the covenant extends to a thing *in esse*, parcel of the demise, it is *quasi* annexed to

^b And. 55; Palmer, 558; Vent. 175; 2 Lev. 26.

^d *Brudenell v. Roberts*, 2 Wils. 143.

^c *Lougher v. Williams*, 2 Lev. 92; Skin. 305, pl. 1, S. C. cited.

^e See Fonb. Tr. Eq. b. 1, c. 5, s. 4; 1 Rol. Abr. 521; Cro. Eliz. 457; Moor, 399.

thing demised, and runs with the land, and shall bind the assignee, though not expressly named^f. But if the covenant extends to a thing not in being at the time, it is otherwise; for it cannot be annexed or appurtenant to a thing which is not *in esse*. Thus, if *A.* lease for years to *B.*, and *B.* for himself, his executors, and administrators, covenants with *A.* to build a wall upon part of the land demised, and after *B.* assigns, the assignee is not bound by this covenant, unless expressly named, for the law will not annex the covenant to a thing not *in esse*^g. But if *B.* had covenanted for him and his assigns to build the wall, &c. this would have bound the assignee, because it is to be done upon the land, and the assignee is to have the benefit of it^h (1).

But if lessee for years covenant for him and his assigns to rebuild and finish a house within such a time, and after the time expired, the lessee assigns over the premises, the house not being built and finished according to the covenant; this covenant shall not bind the assignee, because it was broken before the assignment; but otherwise, if broken after; as if the lessee had assigned before the time expiredⁱ.

Also, though the covenant be for him and his assigns, yet if the thing to be done be merely collateral, and no way concerning the thing demised, the covenant shall not bind the assignee; as if it be to build a house upon other land of the lessor, or to pay a collateral sum^k.

^f 5 Co. 16, b; Godb. 270. Raym. 388, *per* Holt, Ch.

^g *Spencer's case*, 5 Co. 15. Just.; 3 Burr. 1271; 1 Blac.

^h 5 Co. 15, *per cur.* Rep. 351, S. P.

ⁱ 5 Co. 15, *per cur.*; Cro.

^k Salk. 199, pl. 5; 1 Lord Jac. 438, S. P. adjudged.

(1) And therefore, it should seem, that the covenantee would be entitled in equity to a decree for a specific performance of a covenant to build. *City of London v. Nash*, 3 Atk. 515; 1 Ves. 12. But see the case of *Lucas v. Commerford*, 3 Bro. Cha. Rep. 166.

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But if lessee for years, for himself, his executors and administrators, covenants with his lessor to leave fifteen acres every year for pasture, without culture, and afterwards the lessee assigns; the assignee, though not named, must perform the covenant, because it is for the benefit of the estate, according to the nature of the soil: but a collateral covenant, as to build *de novo*, &c. shall not bind him, unless named¹.

So if *A.* demise to *B.* several parcels of land, and the lessee covenant for him and his assigns to repair, &c. and afterwards the lessee assigns to *D.* all his estate in parcel of the land demised, and *D.* does not repair that to him assigned, the lessor may have an action of covenant against *D.* the assignee^m; because this covenant follows the landⁿ. So, if the lessor had granted the reversion of part to one, and of another part to another, they might have brought an action of covenant^o.

And if *A.* lease to *B.* and *B.* covenants to repair, &c. and he assigns to *J. S.* who dies intestate, the premises being out of repair, the lessor may bring covenant against his administrator as assignee^p.

If a man lease for years, and the lessee covenant for him and his assigns, to pay the rent so long as he and they shall have the possession of the thing let, and the lessee assigns, the term expires, and the assignee continues the possession afterwards; an action of covenant will lie against him for rent behind after the expiration of the term; for though he is not an assignee strictly according to the rules of law, yet he shall be accounted such an assignee as is to perform the covenants^q.

So a covenant in a lease, that the lessee, his executors

¹ Cro. Jac. 125, adjudged.

^m 1 Rol. Abr. 522; Cro. Car. 221, S. C. adjudged.

ⁿ Jones, 245, S. C. adjudged.

^o Lev. 109; Sid. 157;

Kitchen v. Buckley, Raym. 80.

^p Carth. 519; *Tilney v. Norris*, adjudged, 1 Raym.

553; Salk. 309, pl. 13.

^q *Bromfield v. Sir John Williamson*, Style, 407.

and administrators, shall constantly reside upon the demised premises, during the demise, is binding upon the assignee of the lessee, though he be not named; for it is *quodam modo* annexed and appurtenant to the thing demised¹.

But if a lessee for years, with covenants to repair, assigns to *J. S.* by way of mortgage, and *J. S.* never enters, equity will not compel him to repair, though the estate being forfeited, he had the whole interest in him, and though it was his own folly to take an assignment of the whole term, when he should have taken a derivative lease, by which means he would not be liable at law². But it is otherwise in the case of an assignee under an absolute indefeasible assignment of the whole interest in the term; for there actual entry is not necessary to make him chargeable³.

But although the covenant be of a nature to run with the land, yet it will not discharge the party covenanting; but have the effect only of giving him with whom it is made an additional remedy. Thus, if a lessee covenant that he and his assigns will repair the house demised, and the lessee grants over the term, and the assignee does not repair it, an action of covenant lies either against the assignee at common law, (because this covenant runs with the land,) or against the lessee, on his express covenant, at the election of the lessor⁴.

Where lessee
liable after
assignment.

So, if a man lease for years, rendering rent, and the lessee covenant for him and his assigns to repair the house during the term, and afterwards the lessee assigns over the term, and the lessor accepts the rent from the assignee, and then the covenant is broken, notwithstanding the acceptance of the rent from the assignee, an action of

¹ *Tatem v. Chaplin*, 2 H. Black. 133.

² *Walker v. Reeves*, Ibid. 461, n.

³ 2 Vern. 275; *Eaton v. Jaques*, Dougl. 455.

⁴ Bro. Covenant, 32; 1 Rol. Abr. 522, S. C.; Jones, 223, S. P. *per cur.*

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covenant lies against the first lessee, for the lessee hath covenanted expressly for him and his assigns, and this personal covenant cannot be transferred by the acceptance of the rent^x. But if the covenant be merely implied by law, the lessor's acceptance of the assignee will entirely discharge the lessee^y.

So also, if *A.* lease to *B.* rendering rent, and *B.* covenants to pay it, and after *B.* assigns to *C.* and *A.* grants the reversion to *D.* and *D.* accepts rent from *C.* yet for non-payment at another day, *D.* may have an action against *B.* it being upon an express covenant^z.

And although all the estate and interest of a lessee be divested out of him, and assigned by act of parliament, yet, without express words of discharge, he is still liable upon his covenant for the rent^a.

Hence, an assignment under a commission of bankrupt will not discharge the lessee from his express covenant^b.

Also, an assignee who assigns over, is liable, and shall pay the rent which became due before, if during his enjoyment^c (1).

^x 1 Rol. Abr. 522; Cro. Andr. 40; 1 Term Rep. 93, Jac. 309, 521, S. C. n. S. C.

^y 1 Sid. 447; Cro. Jac. 523. ^b *Mills v. Auriol*, 1 H. Blac. 433; affirmed in error, 4 Term Rep. 94.

^z 3 Lev. 233, *Edwards v. Morgan*, adjudged, Carth. 178, S. C. cited, Brownl. 20; Sid. 447, S. P. ^c *Knight v. Freeman*, 1 Raym. 303; 1 Vent. 329, 331; *Treacle v. Coke*, 1 Vern. 165.

^a *Hornby v. Houlditch*, 165.

(1) But in order to make a covenant run with the land, it is not sufficient that it be concerning the land; there must also be a privity of estate between the covenanting parties. If, therefore, a mortgagor and mortgagee of a term make a lease, in which the covenant for the rents and repairs are with the mortgagor and his assigns, the assignee of the mortgagee cannot maintain an action for the breach of these covenants, because they are collateral to his

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And as an assignee shall be bound by a covenant real, annexed to the estate, and which runs along with it, so shall he take advantage of such; and therefore, if the lessor covenants to repair, or if he grants to the lessee so many estovers as will repair, or he shall burn within his house during the term; these, as things appurtenant to the land, shall go with it into whose hands soever it comes^d.

Where an assignee shall take advantage of a covenant.

So, if a man lease lands to another by indenture, using the words grant and demise, which imply a covenant in law for quiet enjoyment, created by the word "demise," the benefit of the covenant shall go to the assignee of the term, and he shall have advantage of it^e; for it is but reasonable that he should have the same benefit of the demise as the original lessee might have had; and the lessor is not prejudiced by it.

And it is the same of tenant by statute-merchant, &c. of a term, &c. though they came to the land by act in law^f. The assignee of the assignee, the executors of the assignee, the administrators of the assignee, are likewise all comprised within this word "assigns^g."

^d 1 Rol. Abr. 521; Co. Lit. resolved *Holmes v. Buckley*, 384, a; 5 Co. 17, b; Godb. 1 Eq. Ca. Abr. 27.
^e 5 Co. 17, a.
^f 5 Co. 77, b; Carth. 519;
^g 1 Rol. Abr. 521; Dyer, 1 Ld. Raym. 553; Salk. 309, 257; 4 Co. 80; *Spencer's* case, 5 Co. 17, a, b; S. P. pl. 13.

assignor's interest in the land, and therefore do not run with it; *Webb v. Russel*, 3 Term Rep. 393. But such action may be maintained by the mortgagor himself. *Stokes v. Russel*, Ibid. 678; affirmed in error, 1 H. Blac. 562. So, where a lessee granted an under-lease to another, although for the whole of his term, except only a day, yet the lessor had no action against the under-lessee for arrears of rent due upon the original lease, there being no privity between them. *Holford v. Hatch*, Dougl. 182; and see *Thursby v. Plant*, 1 Saund. Rep. 237, n. 3, 4, 5.

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And in all cases where the lessee parts with the whole of his term, it is considered as an assignment giving to the assignee the advantages of the covenants in the lease, although the transfer be in the form of an under-lease, reserving a different rent, and containing different covenants^b.

But an assignee shall not have an action upon a breach of covenant which happened before his time^c; though he may upon a breach after his time, although his estate be determined^d.

If a lessee for years covenants to leave the houses in good repair at the end of the term, and the lessor grants his reversion to another, though this covenant is not to be performed during the term, yet for a breach thereof the grantee of the reversion may bring an action; for this covenant runs with the land^e.

The law respecting the operation of covenants as binding upon, and giving the benefit of them to assignees, has been somewhat extended by the statute 32 Hen. 8, c. 34.

Stat. 32 Hen. 8,
c. 34.

By that statute, after reciting, "that whereas divers persons leased manors, &c. or other hereditaments (1) for life or lives, or years, by writing, containing certain conditions, covenants and agreements, as well on the part of the lessees and grantees, their executors and assigns, as on the part of the lessors and grantors, their heirs and successors; and whereas, by the common law, no stranger to any condition or covenant could take advantage thereof; by reason whereof, all grantees of reversions, and all grantees and patentees of the king, of abbey lands, could have no entry or action for any breach, &c.; it is enacted, that all

^b *Palmer v. Edwards*,
Doug. 186, n.

^c Cro. Eliz. 863; 3 Leon.
51; 2 Vent. 278.

^d 1 Rol. Rep. 80; Owen,
152; 2 Bulst. 281.

^e Cro. Eliz. 599, 617;
Gould. 175, S. C.

(1) Extends not to gifts in tail. Co. Lit. 215; Cro. Eliz. 863.

persons, bodies politic, their heirs, successors and assigns, which have, or shall have, any grant of our said lord the king (1), of any lordship, &c. rents, tithes, portions, or other hereditaments, or any reversion thereof, which belonged to the monasteries, &c. or which belonged to any other person, &c. and also all other persons, being grantees or assignees (2), to or by our said lord the king, or to or by any other person or persons, and the heirs, executors, successors and assigns of every of them (3), shall and may

(1) It extends to his successors, though not named. Co. Lit. 215, a.

(2) Though after breach, and before the action brought, their estate determines. 1 Rol. Rep. 80; Owen, 151; 2 Bulst. 281.

It extends to grantees of part of the estate of the reversion, as an estate for life by the reverser in fee. Co. Lit. 215, a; Godb. 162; 1 Rol. Rep. 80; Owen, 151; 2 Bulst. 181; and see Leon. 252; Moor, 93, pl. 230. But not to grantees, &c. of the reversion in part of the land; and therefore if the reverser of three acres of land grant two of them only, the grantee cannot have the benefit of the covenants annexed to the three acres. Co. Lit. 215; Cro. Eliz. 833; Moor, 98.

It extends to him that comes in by limitation of an use, though in the *past*; for coming in by the act and limitation of the party, he is a sufficient grantee, &c. within the statute. Co. Lit. 215; Moor, 98; 4 Leon. 27, 29. But it does not extend to such as come in merely by act in law, as the lord upon an escheat, alienation upon a mortmain, &c. Co. Lit. 215, b. Nor to him who is in of another estate. Moor, 876.

And if a copyholder by licence of the lord leases for years, &c. and after surrenders the reversion to the use of another in fee, who is admitted, yet he is not a grantee, &c. within the act, for he is not privy to the lease made by the copyholder, nor in by him, but may plead a grant of his estate immediately from the lord. *Brasier v. Beal*, Yelv. 222; Cro. Jac. 205; and see Cro. Car. 25, 44; Hob. 178.

(3) Lessee for twenty years leases for ten years, and his lessee covenants, &c. and the first lessee grants his reversion, this grantee is a sufficient assignee within the statute. Moor, 525, 527; Cro. Eliz. 599, 617, 649; Goulds. 175; Godb. 161.

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have like advantage by entry for non-payment of rent, or for doing waste or other forfeiture (1); and the same remedy by action (2) only for not performing other conditions, covenants and agreements, contained in the said leases against the lessees and grantees, their executors, administrators and assigns, as the lessors and grantors, their heirs or successors, ought, should or might have had at any time or times (3)."

And by the same act, it is enacted, "that all farmers, lessees and grantees of lordships, &c. rents, tithes, portions or other hereditaments for years, life or lives, their exe-

(1) Viz. by force of a condition incident to the reversion, as rent, or for the benefit of the estate, as for doing waste, not keeping houses in repair, &c. and not for the payment of any sum in gross, delivery of corn, &c. Co. Lit. 215, b; and see 5 Co. 18; Moor, 159, 243, 876; Owen, 41; And. 82; Raym. 250; Saund. 159. If the proviso be to enter for non-payment of a rent, or gross sum, by way of a fine, the grantee of the reversion shall not take advantage of it; for the condition cannot be apportioned. Style, 316; *sed quare*.

But he shall not take advantage of a condition before he has given notice to the lessee. Co. Lit. 215; 5 Co. 113, b. *Secus*, of a covenant; Godb. 262; Cro. Jac. 476; Bridg. 130.

(2) The privity of action is transferred, and it may be brought in the county where the covenant was made, though the lands lie in another. Saund. 237, adjudged; but a writ of error was brought in Cam. Scacc. and it was after compounded. Sid. 401; Lev. 259; Vent. 10; and 3 Mod. 338.

(3) Therefore, if the conusee of the reversion before attornment, bargains and sells to another, to whom the lessee attorns, the bargainee may, &c. though his bargainor could not. 5 Co. 113, a.

A. devises to B. for years, rendering rent, upon condition to re-enter for non-payment; and afterwards devises the reversion in fee to another, and dies; the devisee may take advantage of the condition, though there never was any reversion, &c. in the devisor. 2 Leon. 33.

cutors, administrators and assigns (1), shall and may have like action and remedy against all persons, bodies politic, their heirs, successors and assigns, which by grant of the king, or other persons, shall have the reversion of the same lordships, &c. so letten, or any part thereof, for any condition, covenant or agreement, contained in their leases, as the lessees, or any of them, might or should have had against the lessors and grantors, their heirs and successors; recovery in value, by reason of any warranty in deed or law, only excepted."

It now seems proper to inquire, concerning the rules of construction applicable to covenants; and first, as to the construction of covenants in general; secondly, as to the usual covenants for the title, &c. in common assurances.

How covenants
are to be con-
strued.

As to the construction of covenants in general, the rule is, that all covenants are to be taken according to the intent of the parties, expressed by their own words; and if there be any doubt in the sense of the words, such construction shall be made as is most strong against the covenantor, lest by the obscure wording of his contract, he should find means to evade and elude it^m. Hence, if *A.* covenants with *B.* that, if *B.* marries his daughter, he will pay him 20*l.* per annum, without saying for how long, it shall be for the life of *B.* and not for one year onlyⁿ; for by the word "per annum," the meaning of the parties appears to be, that it should continue longer than one year; and this is the construction that is most strong against the grantor.

So if *A.* lease land to *B.* for six years, and covenant that he shall enjoy it during the term without interruption,

^m *Sir Richard Perhall's* 102; *Sid.* 151; *Keb.* 511, case, *Moor*, 458; 8 *Co.* 83. S. C.

ⁿ *Hookes v. Swain*, *Lev.*

(1) But if lessee for thirty years leases to another for ten, he is no assignee within the statute; for he is not tenant to the first lessor. *Moor*, 93, pl. 230.

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discharged from tithes, and after the six years he is sued for tithes, this is a breach; for the meaning was, that he should be freed from suits, and the payment of tithes; and a suit after the expiration of the term, is as prejudicial, as if before^o.

So, if a man take a lease of a house and land, and covenants to leave the demised premises in good repair at the end of the term, and he erects a messuage upon part of the land, besides what was before, he must keep or leave this in good repair also^p. For it is a continuing covenant; and though the house had no actual, yet it had a potential being, at the time of the lease.

If a lease be made for years, rendering a certain yearly rent, free and clear from all manner of taxes, charges and impositions whatsoever, the lessee is bound to pay the whole rent without any manner of deduction, for any old or new tax, charge or imposition whatsoever^q.

Having thus attempted to explain the general nature of deeds, and their several parts, we are next to consider the several species of them, together with their respective incidents. But in doing this it will be sufficient to notice those only, which, from long practice and experience of their efficacy, are generally used in the alienation of real estates: "for it would be tedious, nay infinite, to descant upon all the several instruments made use of in personal concerns, but which fall under our general definition of a deed; that is, a writing sealed and delivered. The former, being principally such as serve to convey the property of lands and tenements from man to man, are commonly denominated conveyances; which are either conveyances at common law, or such as receive their force and efficacy by virtue of the statute of uses^r." Of conveyances by the

^o Cro. Eliz. '916; 2 ^q *Giles v. Hooper*, Carth. Brownl. 22. 135.

^p *Brown v. Blunden*, 3 ^r 2 Blac. Com. 309.
Lev. 265, *per curiam*; Skin.
121, S. P.

common law, some may be called original, or primary conveyances; which are those by means of which the benefit or estate is created or first arises: others are derivative, or secondary; by which the benefit or estate, originally created, is enlarged, restrained, transferred, or extinguished^a. Of original conveyances, there are six kinds; (that is to say), 1. Feoffments; 2. Gifts; 3. Grants; 4. Leases; 5. Exchanges; and 6. Partitions. Of derivative, five; (that is to say), 1. Releases; 2. Confirmations; 3. Surrenders; 4. Assignments; and 5. Defeazances. Of all these I shall treat in the order they have been here mentioned.

CHAP. III.

OF A FEOFFMENT.

A FEOFFMENT is derived from the verb, to enfeoff, **FEOFFMENT.**
feoffare, or *infeudare*, i. e. to give a feud: hence, a feoffment is properly, *donatio feudi*^a, or the donation of a feud or fee. This is the most ancient method of conveyance, and also the most solemn and public, and therefore the most easily remembered and proved: it being a conveyance by delivery of the possession itself, in the presence of witnesses upon or within view of the lands conveyed. He who so gives, or enfeoffs, is called the feoffor; and the person to whom it is made, is denominated the feoffee^b. This mode of conveyance is plainly derived from, or (says Sir William Blackstone,) is indeed itself the very mode of the ancient feudal donation; for though it

^a 2 Blac. Com. 309.

^b Co. Lit. 9.

^c See 2 Blac. Com. 310;

Co. Lit. 271, b, n. (1); 2

Saund. Uses and Trusts, 1.

FEOFFMENT. may be, and now usually is, performed by the word "enfeoff" or "grant," yet the more ancient feoffments generally run with the words *dedi*, *concessi* or *donavi*, which are said to be the aptest words of feoffment^c. It is also still directed and governed by the same feudal rules as the ancient feudal grant, insomuch that the principal rule relating to the extent and effect of that grant, *tenor est qui legem dat feudo*, is, in other words, become the maxim of our law with relation to feoffments, *modus legem dat donationi*^d. And therefore, as in pure feudal donations, it was requisite that the lord, from whom the feud moved, should expressly limit and declare the continuance or quantity of estate which he meant to confer, *ne quis plus donasse presumatur quam in donatione expresserit*, so, now, if one by feoffment grant lands or tenements to another without limiting or expressing any estate, the grantee has barely an estate for life^e. For, as the personal abilities of the feoffee were originally presumed to be the immediate or principal inducements to the feoffment, the feoffee's estate ought to be confined to his person, and subsist only for his life, unless the feoffor, by express provision in the creation and constitution of the estate, has given it a longer continuance. These express provisions were indeed generally made; for this was for ages the only conveyance by which our ancestors were used to create an estate in fee-simple, by giving the land to the feoffee, to hold to him and his heirs for ever, though it serves equally well to convey any other estate of freehold^f.

This species of assurance, since the more modern and convenient conveyance by lease and release, has, however, much declined. But as from the great force of its operation^g, by transferring the actual possession, it is in many cases peculiarly calculated to secure to the feoffee a quiet enjoyment of his estate, it will be proper to apprise the

^c Co. Lit. 9.

^d Wright, 21.

^e Co. Lit. 42.

^f Co. Lit. 9.

^g See *post*, and Co. Lit.

39, a.

student more fully of its nature and efficacy than has yet FEOFFMENT.
 been done by any modern writer.

With this view, I shall consider,

- I. BY AND TO WHOM A FEOFFMENT MAY BE MADE.
- II. OF WHAT SPECIES OF PROPERTY IT MAY BE MADE.
- III. HOW IT MAY BE MADE.
- IV. ITS EFFECT AND OPERATION.

I. BY WHOM AND TO WHOM A FEOFFMENT MAY BE
MADE.

1. *By whom.*

As a feoffment operates by transmutation of possession, Who may make a feoffment. it is plain, that it can be made only by one who is in actual seisin of the land. And as no seisin can be had of any but freeholds in possession, it follows, that neither reversions, remainder-men, nor persons possessed of chattel interests only, can convey their interests by feoffment; for as to remainders and reversions, the seisin of the freehold is in the particular tenants; and with respect to chattel interests, as a term of years, the seisin remains in the freeholder (1).

(1) From what has been said, the student will perceive, that a feoffment is incompatible with any conveyance which operates by way of use. Therefore, a feoffment and bargain and sale, cannot be made by the same person, of the same lands, and at the same time, as a release and bargain and sale may; because a feoffment, as we have seen, conveys the seisin or possession to the feoffee, but it is essential to the operation of a bargain and sale, as will be shown hereafter, that the possession should remain in the bargainer: for a bargain and sale is a contract to convey, or a seisin to the use of another, and not an absolute conveyance. And a person cannot contract to sell what he has already parted with, or be seised of the possession to another's use, after he has actually parted with it.

FEOFFMENT. Neither the head alone, nor any one or more of the members of a corporation aggregate of many, can alone make a feoffment of any of the land belonging to the corporation: though all of them together may. And if any of them be seised of land in his own right, and in his natural capacity, he may make a feoffment of this land as another man may do.

But subject to the preceding observations, not only all persons capable of conveying by deed, but even (by reason of the solemnity and notoriety of the instrument,) many persons who are incapable of conveying by any other species of deed, may convey by feoffment. Thus an idiot, lunatic, or other person *non compos* may make a feoffment, and it will be good to bind himself, so that he cannot avoid the feoffment, and restore himself to the possession^b; but the heir at law, after the death of any such person, may avoid his feoffment, as may an infant, by writ of *dam fuit infra statum*, avoid his feoffment; but yet the feoffment is not in itself void, for an infant is allowed to contract, and there must be some act of notoriety to restore the possession to him, equal to that which transferred it from him^c. But in these cases, livery must be made by the infant, or *non compos*, in person; for if it be made by letter of attorney, it will be absolutely void; for as the letter of attorney will be void, for want of their power to make a deed, which a letter of attorney is, the feoffment founded upon such void authority must be void also^k.

And the law seems to be the same of a feme covert; for if she make a feoffment upon the land in person, it is only voidable by her husband; but if she make a letter of attorney to give livery, it is absolutely void^l.

^b Lit. s. 40, b; 2 Rol.

Abr. 2; Co. Lit. 247; 4 Co.

125; 2 Show. Parl. Ca. 153.

^c 4 Co. 125; 2 Rol. Abr. 2;

Wittingham's case, 8 Co. 42,

43.

^k 8 Co. 45; Co. Lit. 247,

a; 4 Co. 125, a; 2 Rol.

Abr. 2; Show. Parl. Cases,

153.

^l Perk. 185, 186.

But as the infant's feoffment is voidable by writ when he comes of full age, so it is voidable by him by entry during his non-age, this being an act of equal notoriety as the feoffment itself^a.

And the reason of these distinctions is, that though the contracts of persons disabled by law to contract were void contracts, yet their infeudations were not in themselves void, because they were made *coram paribus curie*, who were presumed not to attest contracts of persons disabled by the law to contract, especially since such contracts were made for military or soccage service, which were for the good of the commonwealth; and by those infeudations a stranger was directed to bring his *præcipe* against the person that was actually invested in the land; wherefore the infant's feoffment was good till it was avoided by an act of equal notoriety, to wit, by his entry *coram paribus*, which was equally solemn with the act of feoffment, or by bringing his action at full age, when the law had enabled him, by action in a court of record, to set aside the feoffment that he had made during minority: but the law enabled him, by entry, to set aside the acts *coram paribus* during minority, because the *pares* might undo what was done *in pais*; and the courts of justice were not to destroy the acts *in pais* till the infant, by his own discretion, had chosen to avoid them, because it was derogatory to the dignity of the courts of justice to set aside the solemn acts *in pais*, till the infant had come to such age of discretion as might make it fully appear that the feoffment was made during his disability; for the infant was not received to disable himself during the time of his disability; but during such disability he might, by equal solemnity *in pais*, disable himself, since such an act was only *coram paribus*, in the same manner as the feoffment itself was made^a.

^a 4 Co. 125; 2 Rol. Abr. 2; 8 Co. 42, 43, 45; Cro. Jac. 617; *Gardiner v. Norman*, Perk. s. 183.

^a Lit. s. 406.

FEOFFMENT. But the letter of attorney of the infant was *ipso facto* void ; and therefore such feoffee was a disseisor, as if no authority had been committed to the attorney to make the feoffment. But in the case of the *non compos*, he was not admitted to stultify himself, because there was no stated time when such persons return to sense and understanding, and therefore they could not be presumed to be conscious themselves of their own follies or defects ; but the king, who had the care of all his subjects, might, as we have seen, by solemn office found, avoid such acts of insanity, as might the heir at law after their death^o.

2. *To whom a Feoffment may be made.*

To whom a
feoffment may
be made.

Generally speaking, a feoffment may be made to any person or body politic capable of holding land. But a man cannot make a feoffment to his own wife, unless by special custom of York, or by the intervention of trustees, by reason of their being considered in law as one person only^p ; and no man can enfeoff to himself.

So one joint-tenant cannot make a feoffment of his part of the land to his companion, for each is already in possession of the whole, and a man cannot give a possession to him that hath it before. But one tenant in common, or one coparcener, may make a feoffment of his part of the land to his companion ; these persons having separate freeholds^q, and not an united seisin like joint-tenants.

And for the reason above given, a lessor cannot enfeoff his lessee of the same land without his consent, such lessee being already in possession. Neither can a feoffment or livery of seisin be made to the king ; for he cannot, by reason of his dignity, take otherwise than by act of record^r.

^o See 2 Blac. Com. 291, & Feoffments, 26 ; Co. Lit. 292 ; F. N. B. 202, D. 193, 200, b.

^p Perk. s. 194. See Co. ; Fitz. Faits & Feoffment, Lit. 3, a. n. 112, a. 21.

^q Perk. s. 197 ; Fitz. Faits

II. OF WHAT SPECIES OF PROPERTY A FEOFFMENT MAY BE MADE.

A FEOFFMENT may be made at this day of any thing which lies in livery, *i. e.* capable of corporeal delivery of possession, by whatsoever tenure it is holden, but not of things of an incorporeal nature, as tithes, advowsons, commons, rents, dignities, or the like, for of these no livery can be made; nor for the same reason can it be made of a reversion or remainder; nor can it of a chattel interest or equitable estate, 'of which no seisin can be had'. But of things of which livery may be made, the feoffment may be of a moiety, a third, a fourth, or other part, and that by the name of such moiety, or other part¹.

Of what a feoffment may be made.

And a feoffment may be made of an upper chamber over another man's house beneath².

And if several persons have land divided amongst them, each having a certain number of acres, but in no certain place, but a part being allotted to him, one year in one place, and another in another, *alternis vicibus*; in this case, either of them may make a feoffment of his part, by the name of so many acres lying in such a meadow, without any boundary or other description of it³. And so if parceners have land, the one from Easter to Lammas, and the other from Lammas to Easter, or the one one year, and the other the other year, *alternis vicibus*; in these and like cases, either of the parceners may make a feoffment of this land⁴.

¹ Co. Lit. 49.

² Ibid. 190.

³ Ibid. 48.

⁴ Ibid. 4, 48.

⁵ Ibid.

FEOFFMENT.

**III. OF THE MANNER OF MAKING A FEOFFMENT, AND
HOW LIVERY OF SEISIN IS TO BE MADE.**

How feoffment
may be made.

FORMERLY, no deed or other writing was necessary to constitute a feoffment, but only livery and seisin on a parol conveyance: and when used, it only served as an authentication of the transaction; and the lands were supposed to be transferred not by the deed of feoffment, but by the livery which it authenticated. But since the statute of frauds and perjuries, which was passed for the express purpose of taking away the modes formerly used of transferring interests in land by signs, symbols, or mere parol declaration, the charter of feoffment is made equally necessary with the livery and seisin, to pass the freehold or inheritance, it being thereby enacted, "That all leases, estates, interests of freehold in any lands, tenements or hereditaments, made or created by livery and seisin only, and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect." Nothing more, however, seems essential to the making a perfect charter, but sealing and delivery; for if a man gives land to another and his heirs, and seals and delivers the deed, and gives livery, it is a good charter; and the inheritance shall pass as well as if it had all the formal parts which are generally used in deeds of conveyance*. The formal parts of a feoffment are, however usually made to be the same as in deeds, viz. the premises, the habendum, the tenendum, the reddendum, the clause of warranty, &c. but the ancient form of these was exceedingly brief; and the covenants for the title, are still usually wholly omitted, because the operative words of the feoffment, viz. "give, grant and enfeoff," are holden to imply

* 2 Rol. Abr. 21; Co. Lit. 7.

in themselves a general warranty for the title against the feoffor; and the warranty will bar his lineal heirs (general or tail) having assets, and a collateral heir without assets; as it may also a reversioner or remainder-man, where no assets descend; and in some cases, a latent intail. But as the warranty only binds the lineal heir having assets, it seems better that the feoffor should be made to covenant also for the title for himself, his heirs, executors and administrators; in which case the personal, as well as the real assets of the feoffor, will be bound.

But by the mere words of the deed, the feoffment is by Livery of seisin, no means perfected; there remains a very material ceremony to be performed, called *livery of seisin*; without which the feoffee has but a mere estate at will^b (1). For as all property in lands began by occupancy, so, it seems, the first method of transferring property was by investiture: for as no man could originally appropriate, but by settling himself in the possession and application of it to his own use, so no man could transfer but by a solemn and public delivering over of the possession; and the ceremony used in such act of delivery is in our law called livery and seisin, and is thus defined, *solemnis rei feudalis traditio sub præstatione fidei coram testibus vassalo, facta*. This livery of seisin is no other than the pure feudal investiture, or delivery of corporeal possession of the land or tenement; which was held absolutely necessary to complete

^b Lit. s. 66:

(1) Livery of seisin should be and usually is indorsed upon the deed; because as no more than an estate at will, as has been before observed, passes, without livery, it is material that evidence of its having been made should accompany the deed. If, however, this be omitted, yet the courts of equity will, in favour of alienation, and of a purchaser for a valuable consideration, presume it to have been made, where possession has gone, according to the feoffment, for great length of time; *Jackson v. Jackson*, Fitzgib. Rep. 146, and have even in some cases supplied the want of it. See *Burgh v. Francis*, Finch, 28, 174.

FEOFFMENT. the donation. "*Nam feudum sine investitura nulla modo constitui potuit*:" and an estate was then only perfect, when, as the author of Fleta expresses it in our law, *fit juris et seisinæ conjunctio*^d." The end and design of this institution was, by the ceremony or solemnity of the act, to give notice of the translation of the feud from one hand to another; because if the possession might be changed by the private agreement of the parties, such secret contracts would make it difficult and uncertain to discover in whom the estate was lodged, and consequently the lord would be at a loss of whom to demand his services; and strangers equally perplexed to discover against whom to commence their actions for the prosecution and recovery of their right^e. And as this mode of conveyance was made use of before men were acquainted with letters, it was required to be on or near the land, that the other tenants of the manor might be witnesses of it, who in those days were called to the lord's court, to determine all controversies relating to such translation; and though after the use of letters a charter of feoffment was introduced, yet this was not necessary, but only tended to the authentication or evidence of it^f. In the Roman law, *plenum dominium* was not said to subsist, unless where a man had both the right and the corporeal possession; which possession could not be acquired without both an actual intention to possess, and an actual seisin or entry into the premises, or part of them, in the name of the whole^g. And even in ecclesiastical promotions, where the

^c Wright, 37.

^d L. 3, c. 15, s. 5.

^e See Spelm. Gloss. 510;

5 Co. 84, b.

^f Spelm. Gloss. 510; 2

Blac. Com. 311; and see

Gilb. Ten. Index, "Feoffments;" Co. Lit. 330, b. n.

^g *Nam apiscimur possessionem corpore et animo; neque per se corpore, neque per se*

animo. Non autem ita accipiendum est, ut qui fundum possidere velit, omnes glebas circumambulet; sed sufficit quamlibet partem ejus fundi introire. (Ff. 41, 42, 43.) And again; *traditionibus dominia rerum non nudis pactis, transferuntur. (Cod. 2, 3, 10.)*

freehold passes to the person promoted, corporeal possession is required at this day, to vest the property completely in the new proprietor; who, according to the distinction of the canonists^b, acquires the *jus ad rem*, or inchoate and imperfect right, by nomination and institution; but not the *jus in re*, or complete and full right, unless by corporeal possession. Therefore, in dignities, possession is given by instalment; in rectories and vicarages, by induction; without which no temporal rights accrue to the minister, though every ecclesiastical power is vested in him by institution. So also, even in descents of lands by our law, which are cast on the heir by act of the law itself, the heir has not *plenum dominium*, or full and complete ownership, till he has made an actual corporeal entry into the lands: for if he dies before entry made, his heir shall not be entitled to take the possession, but the heir of the person who was last actually seised^c. It is not therefore only a mere right to enter, but the actual entry, that makes a man complete owner, so as to transmit the inheritance to his own heirs; *non jus, sed seisinā, facit stipitem*^k.

Yet, the corporeal tradition of lands being sometimes inconvenient, a symbolical delivery of possession was in many cases anciently allowed; by transferring something near at hand, in the presence of credible witnesses, which by agreement should serve to represent the very thing designed to be conveyed; and an occupancy of this sign or symbol was permitted as equivalent to occupancy of the land itself. Among the Jews we find the evidence of a purchase thus defined in the book of Ruth¹; "Now this was the manner in former time in Israel concerning redeeming and concerning changing, for to confirm all things; a man plucked off his shoe, and gave it to his neighbour: and this was a testimony in Israel." Among

^b Decretal. l. 3, t. 4, c. 40.

¹ Ruth, ch. 4, v. 7; and

² Blac. Com. 209, 227, see Gen. c. 23, v. 11; also Co. Lit. 49, b.

228.

^k Flet. l. 6, c. 2, s. 2.

FEOFFMENT the ancient Goths and Swedes, contracts for the sale of lands were made in the presence of witnesses who extended the cloak of the buyer, while the seller cast a clod of the land into it, in order to give possession; and a staff or wand was also delivered from the vendor to the vendee, which passed through the hands of the witnesses^m. With our Saxon ancestors, the delivery of a turf was a necessary solemnity to establish the conveyance of landsⁿ. And, to this day, the conveyance of our copyhold estates is usually made from the seller to the lord or his steward by delivery of a rod or verge, and then from the lord to the purchaser by re-delivery of the same, in the presence of a jury of tenants.

Conveyances in writing were the last and most refined improvement. The mere delivery of possession, either actual or symbolical, depending on the ocular testimony and remembrance of the witnesses, was liable to be forgotten or misrepresented, and became frequently incapable of proof. Besides, the new occasions and necessities, introduced by the advancement of commerce, required means to be devised of charging and encumbering estates, and of making them liable to a multitude of conditions and minute designations for the purposes of raising money, without an absolute sale of the land; and sometimes the like proceedings were found useful in order to make a decent and competent provision for the numerous branches of a family, and for other domestic views; one of which could be effected by a mere simple, corporeal transfer of the soil from one man to another, which was principally calculated for conveying an absolute unlimited dominion. Written deeds were therefore introduced, in order to specify and perpetuate the peculiar purpose of the party who conveyed: yet still, for a very long series of years, they were never made use of, but in company with the more ancient and

^m Stiernhook De Jure ⁿ Hick's Dissert. Epistolar.
Sueton. l. 2, c. 4. 85.

notorious method of transfer, by delivery of corporeal possession. FEOFFMENT.

On the creation of a freehold remainder, at one and the same time with a particular estate for years, livery must be made to the particular tenant^o. But if such a remainder be created afterwards, expectant on a lease for years now in being, the livery must not be made to the lessee for years, for then it operates nothing; "*nam quod semel meum est, amplius meum esse non potest*"^p; but it must be made to the remainder-man himself, by consent of the lessee for years; for without his consent no livery of the possession can be given^q; partly because such forcible livery would be an ejectment of the tenant from his term, and partly for the ancient reasons, which will be hereafter noticed, for introducing the doctrines of attornments^r.

Livery of seisin is either in deed, or in law^s. The livery in deed is the actual tradition of the land, and is made either by the delivery of a branch of a tree, or a turf of the land, or some other thing in the name of all the lands and tenements contained in the deed; or it may be made by words only, without the delivery of any thing; as if the feoffor being upon the land, or at the door of the house, says to the feoffee, "I am content that you should enjoy it according to the deed, or enter into this house or land, and enjoy this land according to the deed;" this is a good livery to pass the freehold, because in all these cases, the deed of feoffment makes the limitation of the estate, and then the words spoken by the feoffor, on the land, are a sufficient *indiciu*m to the people present, to determine in whom the freehold resides during the extent of the limitation; besides, the words having relation to the deed of

Livery in deed.

^o See 2 Blac. Com. 165, see 2 Saunders's Uses and Trusts, 9.

^p Co. Lit. 49.

^q Ibid. 48.

^r 2 Blac. Com. 228; and

^s Co. Lit. 48, a; and see 1 Watk. Copyh. 261.

FEOFFMENT. feoffment, plainly denote the intention to enfeoff¹. But bare words of limitation, without some act or words to discover the intention of the feoffor to deliver over the possession, are not sufficient to convey the freehold². But if a feoffor deliver the deed upon the land in the name of seisin of all the lands comprised in the deed, this will be good to execute the deed, and to give livery also; because the bare delivery of the deed is good to execute it as a deed³, and the delivery of the deed or any other thing, in the name of seisin of the land, is sufficient to give livery, because the intention of those solemn acts is only to discover to all persons in whom the freehold is lodged, and this end is as effectually answered by the delivery of a deed, or any thing else in the name of a seisin, as of a turf or a twig, the one being equally visible and notorious as the other⁴.

Livery in law.

The livery within view, or livery in law, is when the feoffor is not actually on the land, or in the house, but, being in sight of it, says to the feoffee, "I give you yonder house or land, go and enter into the same, and take possession of it accordingly;" or the like⁵. This sort of livery seems to have been made at first only at the courts baron, which were anciently holden *sub dio* in some open part of the manor, from whence a general survey, or view, might have been taken of the whole manor, and the *pares curia* easily distinguished that part which was then to be transferred. But livery of this kind is not perfect to carry the freehold till an actual entry made by the feoffee, because the possession is not actually delivered to him, but only a

¹ Co. Lit. 48, a; 6 Co. 137, b; *Thorouggood's* case, 6 Co. 26; *Sharp's* case, 2 Rol. Abr. 7; and see Cro. Jac. 80, which seems *contra*.

² 6 Co. 26; 2 Rol. Abr. 7; Co. Lit. 48; Cro. Eliz. 482; 9 Co. 138; Moor, pl. 632.

³ 9 Co. 137, b. 138, a. Co. Lit. 48, a. 57, a; 2 Rol. Abr. 7; 6 Co. 26; and see Moor, pl. 286; *Keale's* case, Cro. Eliz. 25.

⁴ Pollex. 47; Saund. Uses and Trusts, 7; 2 Rol. 7, pl. 2; Co. Lit. 48, b.

licence or power given him by the feoffor to take possession of it; and therefore, if either the feoffor or feoffee die before an entry made by the feoffee, the livery within the view becomes ineffectual and void; for if the feoffor dies before entry, the feoffee cannot afterwards enter, because then the land immediately descends upon his heir, and consequently no person can take possession of his land without an authority delegated from him who is the proprietor; nor can the heir of the feoffee enter, because he is not the person to whom the feoffor intended to convey his land, nor had he any authority from the feoffor to take the possession^v; besides, if the heir of the feoffee were admitted to take possession after his father's death, he would come in as a purchaser, whereas he was mentioned in the feoffment to take as the representative of his ancestor, which he cannot do since the estate was never vested in his ancestor^v. If, however, the feoffee, in such case, dare not enter into the land without peril of his life, he may claim the land, as near as he may safely venture to go; and this shall be sufficient to vest the possession in him, and render the livery within view perfect and complete; for nobody is obliged to expose his life for the security of his property; but when he has gone as far as he may with safety, the law very reasonably looks upon such intention to be as effectual as the act itself; for otherwise it might be in the power of a man, by his own act of violence, to deprive another of his right, and himself receive an advantage from his unlawful act².

And if a man deliver a feoffment, and saying, "I will that you have the lands that you see there, and which are comprised in this deed, according to the purport of the charter," this is a good livery within view; for the deed of feoffment fully denotes the intention to enfeoff, and the

^v Co. Lit. 48, b.

Moor, 85; Pollex. 48; Shep. Touch. 217.

^v Ibid. 48, b. 266, b; ² 2 Rol. Abr. 3; Co. Lit. 2 Rol. Abr. 3, 7; Vent. 186; 48, b.

FEOFFMENT. words are a licence to the feoffee to enter into the land, and to take the possession thereof, according to the charter^a. But if the feoffor had delivered the deed of feoffment within view, and only showed the feoffee the lands, without saying any thing, though the feoffee had actually entered into the land, and the feoffor had afterwards agreed to the entry, yet this, it seems, is no good feoffment; because the bare showing of the lands to the feoffee implies no authority or licence from the feoffor to take possession; and consequently the entry, being without any authority, cannot vest the freehold in him, because there was no solemn act, nor public declaration, made by the feoffor, by which the *pares* might discover a real intention to charge the possession; and the subsequent agreement of the feoffor can never support an act which was originally void; for though the feoffee, after the delivery of the charter, might take the usufructary possession as tenant at will, yet the freehold still continued in the feoffor, for that cannot pass from one to another, without some solemn or public declaration, that the *pares* may, upon any dispute, determine in whom the freehold resides^b.

And the livery within view may be made of lands situated in another county than where the livery is made; for the *pares curiæ*, where the translation of the feud was often made, being holden *sub dio*, the *pares* could have a distinct view of every part of the manor, and therefore were proper to attest this sort of investiture, though the lands were in a different county, for notwithstanding that, they might have been part of the same manor for which the court was holden^c.

Livery in deed may be by attorney.

Livery of seisin in deed need not to be made or received by the person of the grantor or grantee, for a man may either give or receive livery in deed by his attorney (1);

^a 2 Rol. Abr. 7; *Sharp's* 55, b; *Thoroughgood's* case, 6 Co. 26.

9 Co. 136.

^b 2 Rol. Abr. 7; 2 Co. ^c Co. Lit. 48, b.

(1) But otherwise of livery in law. See *post*, 158.

for since a contract is no more than the consent of a man's mind to a thing, where that consent or concurrence appears, it were most unreasonable to oblige each person to be present at the execution of the contract, since it may as well be formed by any other person delegated for that purpose by the parties to the contract^d. But such delegation or authority, to give or receive livery, must be by deed, that it may appear to the court, that the attorney had a commission to represent the parties that are to give or take livery, and whether the authority was pursued^e. For if the letter of attorney be to make livery upon condition, as to make a feoffment conditional, and the attorney deliver seisin absolutely, the livery is not good, because the attorney had no authority to create an absolute fee-simple^f. But if the letter of attorney had been to make livery absolutely, and the attorney had made it upon condition, this, it seems, would be a good execution of his power, and the feoffment valid; because, when the attorney had once delivered possession, he fully executed his power; and the condition annexed to it, being without authority, is void; and therefore shall not destroy the operation of the livery^g. And if a power of attorney be given to make livery to one, and the attorney makes livery to two, or if the attorney had authority to make livery of black-acre, and he made livery of black-acre and white-acre, though the attorney has in these cases done more, yet there is no reason that should vitiate what he has done pursuant to his power, since what he did beyond it is a perfect nullity, and void^h. But if the attorney were to deliver seisin to two, and he had made livery only to one, that had been void, because he had no authority to deliver the whole possession to one exclusively

^d Co. Lit. 52; 2 Rol. Abr. 90; Co. Lit. 258; Perk. Abr. 8.

^e Co. Lit. 48, b. 52, a; 26 Ass. 39; 2 Rol. Abr. 8; Co. Lit. 258; Perk. Abr. 8.

^f 11 Henry 4, 3; 2 Rol. Perk. s. 188.

^g 26 Ass. 39; 2 Rol. Abr. 8; Co. Lit. 258; Perk. s. 192.

^h Perk. s. 189.

FEOFFMENT. of the other, and therefore it is void for the whole¹. And if a letter of attorney be given to two jointly to take livery, and the feoffor make livery to one in the absence of the other, in the name of both, this is void; because they being appointed jointly to receive livery are considered but as one². But if a feoffment be made to two, as to *A.* and *B.* and the feoffor give a letter of attorney to deliver seisin, and he give livery to one, in the absence of the other, but in the name of both, this is a good livery; for though the entire possession be delivered to one only, yet they being joint-tenants by the deed of feoffment, such livery to one makes no alteration or change in the possession; because, if the livery had been made to both, each had been placed in the possession: besides, that every man being presumed to accept a gift for his advantage, *A.* is looked upon as the attorney of *B.* to receive the possession for him; and therefore the livery to *A.* enures to the benefit of *B.* till he disagrees to it¹.

If a letter of attorney be made to three jointly and severally, and two only make livery, this is not good, because not pursuant to their authority, for the delegation was to them all three, or to each of them separately; but if the third was present at the time of the livery made by two, though he did not actually join with them in the act of livery, yet the livery is good; because when they all three are upon the land for that purpose, and two make livery in the presence of the third, there is his concurrence to the act, though he did not join in it actually, since he did not dissent from it^m.

This authority to give livery may be delegated, (if by deed indented), though the attorney be not party to the deed, because the attorney takes nothing by the deed, but has only a naked authority delegated to him; and therefore,

¹ Perk. s. 188.

² Co. Lit. 49; 2 Rol. Abr. 8.

¹ Ibid.

^m Dyer, 62; Rol. Abr. 326. See Co. Lit. 52, b. n. 2, 13th edit.; *Norris v. Trist*, 2 Mod. 78.

since a man may take an estate in remainder, though he is not party to the deed, *à fortiori*, one not party to the deed may receive a naked authority or power by it^a. FEOFFMENT.

And the authority may be contained in the deed of feoffment itself, if that be by deed-poll; for one continent may contain divers deeds to several persons; but not if the feoffment be by indenture, unless the attorney be made a party to the deed^o.

There are few or no persons excluded from exercising this power of delivering seisin; for infants, femes-covert, persons attainted, outlawed, excommunicated, villeins, aliens, &c. may be attorneys; for this being only a naked authority, the execution of it can be attended with no manner of prejudice to the persons under these incapacities or disabilities, or to any other person, who by law may claim any interest of such disabled persons after their death^p. Who may make livery by attorney.

And a feme-covert may be an attorney to deliver seisin to her husband, and so may he in remainder be an attorney to make livery to the tenant for life^q.

The power of the attorney to give livery must be executed during the life of the person that gives it, because the letter of attorney is to constitute the attorney the representative of his principal for such a purpose, and therefore can continue in force only during the life of him who is to be represented. And hence it is, that if *J. S.* take a letter of attorney to deliver seisin after my death, it is void; because he cannot deliver seisin during my life, for that were plainly without any authority from me; nor can he do it after my death, for the reason just given^r.

But if a corporation aggregate, as a mayor and com-

^a 2 Rol. Abr. 8, 9; and see Co. Lit. 52.

^o Co. Lit. 52, b; *sed vide contra*, *Dicker v. Roland*, *Ibid.* n. 4; *Hale's MSS.*; 2 Rol. Abr. 8, pl. 12; and *Moyle v. Ever*, Cro. Eliz. 905.

^p Co. Lit. 52; Perk. s. 187;

^q Co. Lit. 52, a; Perk. s.

198. So a husband may be attorney for his wife, Co. Lit. 52, a.

^r 2 Rol. Abr. 9; Co. Lit. 52; Perk. s. 188.

FEOFFMENT. monalty, or dean and chapter, make a feoffment and letter of attorney to deliver seisin, this authority does not determine by the death of the mayor or dean; but the attorney may well execute the power after their death, because the letter of attorney is an authority from the body aggregate, which subsists after the death of the mayor or dean, and therefore may be represented by their attorney; but if the dean or mayor be named by their own private names, and die before livery, or be removed after livery; seems not good¹.

All these cases of livery by attorney must be understood of livery upon the land, for an attorney cannot make livery within view, because such livery is made by signs or words, instead of the act of delivery; besides, the power of attorney is to deliver the possession, but that power is not executed by the livery in view, because the possession is not in the feoffee till actual entry made by him, and consequently the attorney has not executed his authority².

It is regularly true, that the feoffor must be actually in the possession of the land at the time of the livery made, or otherwise the livery will be ineffectual and void; because the design of the livery is to give notice of the change made of the possession, and therefore it must be a vacant possession that is delivered; but it were absurd, that a man should be permitted to transfer to another what he has not in himself; wherefore, if a man make a lease for years, or life, of his land, or has his land extended by virtue of a statute-merchant, &c. and makes a feoffment and livery, the conusee or lessee being in possession of the land, the livery is void; because the land is filled by the lessee; and consequently, during the continuance of his interest, the feoffee cannot deliver a vacant possession; and therefore the livery, which is a solemnity instituted to

¹ 11 Henry 7, 19; 14 Henry 8, 3; Co. Lit. 52, b; 2 Rol. Abr. 12.
² Co. Lit. 52, b; 2 Rol. Abr. 9; *Aprice v. Rogers*, 2 Dyer, 233.

give notice of the change of the possession, must be void¹. **FEOFFMENT.**

Thus, if there be lessee for years of a house and several closes, and the lessee and all his servants being in the house, the lessor enter into one of the closes, and make a feoffment of it, and give livery, this is a void feoffment; because the possession of part of the thing demised is possession of the whole, for the impossibility that a man should be in the actual possession of every part of the land at the same time; and consequently the lessor cannot take possession of the close, which was filled by his lessee; and therefore the livery must be void, because the feoffor had no vacant possession to transfer at the time of the livery made². So it is, if the lessee for years himself had not been in the house, or any part of the land, yet if his wife, children, or servants, had been on any part of the land, that were sufficient; but the cattle of the lessee grazing upon the land, without either wife or servant on the land, does not fill the possession so as to prevent the lessor from entering, and making a good livery to pass the freehold, because the cattle cannot be said to continue upon the land, *animo possidendi*, for the benefit of their master, as a servant may, and in duty ought to do³.

But if a man makes a lease for life of lands, and afterwards makes a feoffment of the same lands, and makes livery and seisin upon the land, by the assent of the lessee, and in his presence, this is a good livery to pass the inheritance; because the lessee's permitting the feoffor to come upon the land, and make livery, is a sufficient quitting of the possession to him, either by way of surrender, or to create a tenancy at will in the feoffor, to make the feoffment and livery more effectual and valid⁴. But if the

¹ Co. Lit. 48, b; 2 Rol.

Abr. 3, 4; 7 Hen. 4, 19, b;

Dyer, 33; Cro. Eliz. 322.

² *Bettyworth's case*, 2

Co. 31, b; Moor, pl. 397;

2 Rol. Abr. 4; Co. Lit. 48, b;

Dyer, 18, b.

³ Co. Lit. 48; 2 Rol.

Abr. 4; Dyer, 18; Bro. tit.

"Feoffment," 66, but Moor,

11, cont.

⁴ 2 Rol. Abr. 4; *Shep-*

herd v. Greg, Dyer, 18; Bro.

tit. "Surrender," 48.

FEOFFMENT. servant. of the lessee were only on the land, the livery made by the feoffor, though with the servant's permission, had been void if the servant continued in possession at the time of the livery made; for while the servant continued in possession, it must be only for the use and benefit of him that placed him there; and consequently, the possession of the servant must be looked upon as the possession of the master; and therefore the livery must be void, because it could not deliver a possession which was still filled by the master, and which the master never consented to part with; and the permission of the servant will not admit of such a construction as was made in the precedent case, because the servant having no interest, but in right of his master, could neither make a surrender, nor a tenancy at will to the feoffor^a. But it has been holden, where a man made a lease for years of a house, and afterwards made a feoffment of it, with a letter of attorney to make livery, and the attorney came to the house to make livery in the absence of the lessee, and found nobody in the house but the servant of the lessee, who quitted the possession of the house at the desire of the attorney, and then the attorney made livery, which the master approved of at his return, saving his term; that this was a good livery, because here the servant actually quitted the house, and thereby the attorney had a vacant possession to deliver to the feoffee: so, if the attorney had found the lessee himself upon the land, and had entered and ousted him, and then made livery, that had been good to pass the freehold; for though the ouster had been a tortious act, yet the possession became thereby vacant, and consequently, by the livery, might be delivered to the feoffee^b.

And in cases where the feoffor is not in the actual possession, yet if he may enter at pleasure, as where the land is in the occupation of a mere tenant at will, or at sufferance, his feoffment and livery will be good^c; for the feoffor

^a 2 Rol. Abr. 5.

^b Dyer, 363, a; 2 Rol. Abr. 5; Moor, 91.

^c See cases cited, Bacon's Abr. "Feoffment," 8vo. edit. 153.

having a power to reduce the whole into his actual possession at his will; the very act of feoffment, with the livery, may reasonably be taken to be a determination of his will to take the possession, since the livery and feoffment would be invalid, unless he were in possession^d.

If husband and wife be seised of land in fee, and the husband make a feoffment of the whole, the wife being upon the land, yet the livery shall pass the land, because the husband had the whole possession, either in his own right, or in right of his wife; and therefore could deliver it over by the investiture, though the wife should disagree to it^e.

If a man makes a lease for life to *A*, and after makes a feoffment and livery to *A*. of the land in lease, this is a good livery and feoffment; for though the land was in lease to *A*, yet his acceptance of the feoffment and livery amounts to a surrender, *ut res magis valeat*; and, consequently, the feoffor has thereby possession to transfer by the livery to the feoffee^f.

The ancient mode of making a feoffment and giving livery before the *pares* of the manor where the lands lay, being found too much to straiten the transferring the possession, it was found necessary to admit the testimony of strangers; and this came afterwards to be established for the conveniency of it; and because all men of the county assembled at the county-court, in order to determine disputes relating to the whole county, as the tenants of the manor did at their court-baron; and because there lay an appeal from the court-baron to the county-court, so that the *pares* of the county were thereby ultimately to determine of all things relating to the particular manors, it seemed the more reasonable to admit the *pares comitatus* to attest the investiture, through any particular manor, and indifferently through the whole county; and hence it came

When several
parcels will pass
by one livery.

^d 2 Rol. Abr. 5.

^f 2 Rol. Abr. 495; Dyer,

^e 2 Rol. Abr. 5; Perk. s. 358; Moor, 636.

FEOFFMENT. to be admitted, and so the law continues, that if a man seised of lands in several villages in one county, makes a feoffment of the whole, and gives seisin of parcel of the lands in one town, in the name of all the lands in that town and in the other towns, that all the lands of the feoffor lying in that county shall pass, as well as if there had been livery given in each town^a. But if a man having lands in two counties makes a feoffment of both, and gives livery of the land in one county, in the name of all, the land in the other county shall not pass, because there was no relation or dependance between one county and another, as there was between the several manors and county-court; for one county having no power or jurisdiction over another, the *pares* of one were reasonably presumed to be ignorant of what was transacted in the other; and therefore the investiture, which passed the land in one county, was ineffectual to carry the lands in the other, because that investiture could be only a notoriety to the *pares* of the county where it was made; and consequently, there having been no notice given to the *pares* of the other county, by any solemnity of the transferring of the possession, the possession must reside where it was placed by the last investiture^b. If, however, a manor extend into two counties, and the feoffment be made of the whole manor, and livery only in the part lying in one county, in the name of the whole manor, the whole manor shall pass, because the investiture is a notoriety equally to all the *pares* of that manor of the transmutation of the possession; and though they live in different counties, yet they reside *in eodem territorio ab eodem feudam habentis*; and therefore are presumed to be conusant of every thing done within the territory or manor to which they belong^c.

Several persons
may take by
one livery.

And in some cases, several persons may take by one livery; as, where a feoffment is made to several persons, as to A. and B, and livery to one of them in the absence of the

^a Co. Lit. 253, a; 2 Rol. Abr. 11.

^b Perk. 227; 2 Rol. Ab. 11.
^c Perk. s. 229.

other, it will, if made in the name of both, be good to pass FEOFFMENT. the estate to both; because the parties being united in a deed, they all take as one; therefore livery to one, in the name of the rest, is an actual delivery to them all; besides, in the case of such feoffment by deed, *A.* may be looked upon as the attorney of *B.* to receive livery; and therefore the estate will immediately vest in *B.* because every man is presumed to assent to a grant for his advantage*.

IV. OF THE EFFECT AND OPERATION OF A FEOFFMENT.

THE nature of a feoffment, by reason of the delivery to the feoffee, either actually or symbolically, of the lands enfeoffed, is to pass the immediate possession, whether the feoffor have any estate in the land or not. If, therefore, a tenant for life or years only of lands, enfeoff them to another in fee, it will *prima facie* be good, and put the owner of the inheritance to prove his title¹. Hence, as is observed in the Touchstone of Common Assurances, (p. 204,) this not only is the most ancient kind of conveyance, but is also the best and most excellent of all others, and in some respects doth excel the conveyance by fine or recovery: for it is of that nature and efficacy, by reason also of the livery of seisin inseparably incident to it, that it cleareth all disseisins, abatements, intrusions, and other wrongful and defeasible titles, and reduceth the estate clearly to the feoffee, when the entry of the feoffor is lawful, which neither fine, recovery, nor bargain and sale, by deed indented and inrolled, will do, when the feoffor is out of possession^m. And it not only passes the present estate of the feoffor, but bars and excludes him of all

Of the effect
and operation
of a feoffment.

* Co. Lit. 49, 359; 2 Vent. 202, 205; 5 Co. 95; 2 Rol. Abr. 9; 2 Leon. 23, *Mutton's case*.
^m Co. Lit. 49, 237; 1 Co. 111, 112, 121; 6 Ibid. 70; Plow. 423, 424, 554; Perk. s. 210; 1 Salk. 340; 2 Blac. Com. 357.

¹ Lit. s. 611, 698; 2 Inst. Com. 357.

FEOFFMENT. future right, and possibility of right, to the thing enfeoffed; and if he have any rent, common, or the like, in or out of the land, it is extinguished and gone by the feoffment. It also bars the feoffor of all collateral benefits touching the land, as conditions of re-entry, &c. powers of revocation, writs of error, and the like: if, therefore, a man convey his land upon condition, or with power to revoke it, and afterwards make a feoffment of the land, he is for ever barred of taking advantage of the condition, or power of revocation: so also does it bar and destroy all contingent remainders depending upon particular estates, in like manner as a fine or recovery^a: for the feoffment and livery are much favoured in law, and shall be construed most strongly against the feoffor, and in advantage of the feoffee: because it is so solemnly and publicly made, it is of all other conveyances most observed in its execution, and therefore best remembered and proved^b.

Where a feoffment operates as an actual disseisin.

Though a feoffment has invariably been admitted to operate as a disseisin, yet it has been a subject of much discussion, what possession is required in the feoffor to make his feoffment an actual disseisin of the freehold, and not merely a disseisin at the election of the party; Mr. Butler has presented the student with a full investigation of the abstruse, but by no means useless, learning upon this subject^c.

And he observes, that it seems to be admitted by the court, in the case of *Taylor v. Horde*^d, that originally no greater estate was required to be in the feoffor than mere possession. This they attribute to the solemnities originally attending both the admission of tenants into the tenure, and the transfer of the fee. But it seems to be their opinion, that since most, if not all, of these solemnities,

^a *Archer's case*, 1 Co. 66, b; Lit. Rep. 160.

^b See *Shep. Touch.* 200;

^c *Saund. Uses*, 14; 1 Leon. 33, pl. 40; *Hob.* 337.

^d See Co. Lit. 330, b, n. (1); and see *2 Saund. Uses and Trusts*, 24.

^e 1 Bro. 60.

have been dispensed with, the peculiar efficacy of a feoffment has been lost. This has certainly been the case in one very remarkable instance. Lord Chief Baron Gilbert, in his *Treatise of Tenures*¹, observes, "that the feoffee of the disseisor that came in by title, after a year and a day was expired, was anciently held to have right of possession, and to put the disseisee to his writ of entry, because the feoffee came in by title. Hence, writs of entry against the feoffee in the *per* and *cui*: but this was not held so in respect of disseisors, because they themselves, being the wrong-doers, had no law in their favour, lest it should encourage such injuries. But afterwards, as feoffments became more secret, and nothing paid to the lord, then they thought it too hard such feoffments should alter the right of possession; and therefore they construed the feoffee that came in by his own act to be a wrong-doer, and not to alter the right of possession." But it will be difficult to find another instance in which feoffments have lost their efficacy. The arguments brought to prove that they have lost their efficacy in creating an estate of freehold, when it is not in the feoffor at the time of the feoffment, are, 1st, that livery is not made now with the solemnity with which it was made formerly; 2dly, that the passages in the books, which speak of feoffments by tenants for years, and others having estates less than freehold, creating estates of freehold in the feoffee, by disseisin, are to be understood as referring only to a disseisin by election; but both these objections have been very ably and satisfactorily confuted by Mr. Butler in his annotations upon the 1st Institute of Lord Coke². For with respect to the first, he adduces the most decisive evidence, "that from the reign of Henry II, to the present time, the courts of judicature and the writings of the professors of the law, are perfectly agreed in considering feoffments as made with the same ceremonies, and attended with the same efficacy and operation:" whence he concludes,

¹ P. 43.² 330, b.

FEOFFMENT. that it can be no argument against their having the efficacy and operation contended for in the particular instance in question ; that at a period anterior to that mentioned here, they were made (if that really was the case) with more notoriety and ceremony than they are now. And as to the second objection, that the passages in the books which speak of tenants for years and others having estates less than of freehold creating estates of freehold in the feoffee by disseisin, are to be understood as referring only to a disseisin by election ; he observes, that by a disseisin at the election of the party, is not to be understood an act which in itself is a disseisin, but which the party supposed to be disseised, may, if he pleases, consider as not amounting to a disseisin : on the contrary, every act which is susceptible of being made a disseisin by election, is no disseisin till the party in question, by his election, makes it such. It follows, therefore, that every act which is said by the writers to produce an immediate disseisin, necessarily implies an actual disseisin. Now we find, that the disseisins produced by feoffments instantly gave the feoffee, against every person but the disseisee, an immediate estate of freehold, with all the rights and incidents annexed to it. The wife of the feoffee became immediately entitled to her dower ; the husband of the feoffee to his curtesy ; and the descent upon the heir of the feoffee immediately took away the entry of the disseisee. This is the constant language of the books, when they speak generally of disseisins. Now the books make no difference, whether the feoffment is made by a person seised of an estate of freehold, or by a person having only the bare possession, as tenant for years, at will, or by sufferance. Bracton says, that immediately upon the feoffment the estate becomes the property of the feoffee, as between him and the feoffor, and every other person, except the rightful owner ; that a long and uninterrupted possession of a certain duration, will make the title of the feoffee good even against the rightful owner ; that, to pre-

vent this, the donor must restore his own seisin. But if **FEOFFMENT.**
 the feoffee in this case were only a disseisor at the election
 of the disseisee, it would follow, that he was not a dis-
 seisor till the right owner made him such by his election;
 and therefore, that the fee would not be in him, if the
 rightful owner did not elect to make him a disseisor.
 According to this doctrine, if the feoffee of tenant for
 years, or any other person making a feoffment without an
 estate of freehold in him, died in the life of the rightful
 owner of the estate, the estate would not be subject to
 dower or curtesy, nor would the entry of the rightful
 owner be taken away. But we find, that in all cases in
 which our law-writers treat of disseisins made by feoff-
 ments, they consider it as a matter of course, that the
 estate of the feoffee, immediately became an estate of
 freehold, with all the qualities and rights of a freehold
 estate annexed to it. In every stage of our law, the most
 modern as well as the most ancient, the peculiar operation
 of a feoffment, as to the divesting of estates, destruction
 of contingent remainders, and extinction of powers, has
 been recognized. Citations and arguments, to prove the
 point before us, might be easily multiplied; but they shall
 be concluded here, by some observations upon the allowed
 effect of a fine levied by a tenant for years, or even by
 a tenant at sufferance, who has previously made a feoff-
 ment. No point of our law is more clearly settled, than
 that unless some one of the parties to a fine has an estate
 of freehold in the lands of which it is levied, it is totally
 void as to all strangers, and may be avoided at any time by
 the plea, *quod partes finis nihil habuerunt*. Now, supposing
 a tenant for years to make a feoffment, and the feoffee
 afterwards to levy a fine, it is clear, that the fine would be
 without effect, unless the feoffment gave him an estate of
 freehold. But in the case of *Whalley v. Tancred*¹, it was

¹ 1 Vent. 241; Sir Thomas Raymond, 219, 1 Leon.
 p. 2, 5th.

FEOFFMENT. settled, that where a fine is levied in this manner, the fine will bar the lessor at the end of five years after the expiration of the term; which could not be the case unless the feoffment had previously created an estate of freehold^a. Upon the whole, therefore, he submits to the reader's consideration, 1st, that, as feoffments have not been made from the reign of Henry II, to the present time, with any other solemnities than those with which they are made at present, every operation and efficacy which has been constantly and uniformly allowed or ascribed to them by the courts of judicature, or writers of authority cotemporary with or subsequent to that monarch's reign, down to the present time, ought, notwithstanding the objection that they are not now made with some of the solemnities with which they are said to have been made in their very earliest institution, to be allowed and ascribed to them now: 2dly, that by the passage cited from Bracton, and the other authorities cited or referred to by him, it appears, that the disseisin produced by feoffments must be understood to be an actual disseisin, and not a disseisin merely at the election of the party: 3dly, that in many of these authorities it is most expressly mentioned, and in all of them it must be implied, that however slender, bare, or tortious the possession of the feoffor is, his feoffment necessarily and unavoidably vests the freehold in the feoffee, till the disseisee by entry or action restores his possession: 4thly, that copyholders, tenants for years, by *elegit*, statute-merchant, statute-staple, at will, or by sufferance, are all considered to have the possession of the estate, and that they may by feoffment vest an actual estate of freehold in the feoffee: 5thly, that a fine may be levied of, or a common recovery suffered upon, this estate of freehold: 6thly, that the feoffment so executed, the fine so levied, and the recovery so suffered, are immediately good against every person except the rightful

^a Co. Lit. 330, b; and *Doe v. Prosser*, Cowp. 217.

owner: and 7thly, that in process of time they become FEOFFMENT. good against the owner himself*.

This doctrine may be illustrated by applying it to a case which not unfrequently happens: suppose *A.* to be possessed of a mortgage term of one thousand years under a decree of foreclosure, and it cannot be ascertained, owing to the length of time since it was created, in whom the reversion in fee is subsisting (1), in this case *A.* by executing a feoffment and levying a fine of the land, may acquire the absolute fee-simple after five years non-claim (2).

* See *Co. Lit. ub. supra*; and 2 *Saund. Uses and Trusts*, 17, (9).

(1) If the reversioner be known to whom rent is paid or service performed, the feoffment will be deemed fraudulent against the reversioner, by reason of the privity between him and the reversioner, and inoperative. See 3 *Co.* 77, 2; and see *Brandlyn v. Ord*, 1 *Atk.* 571; and *Whalley v. Tancred*, 1 *Vent.* 241; *T. Raym.* 219; *Shields v. Atkins*, 3 *Atk.* 141, 339, 562; *Pomfret v. Windham*, 2 *Ves.* 481.

(2) In a case of this kind it is usual, and seems advisable previously to the feoffment, to assign the term to a trustee in trust to attend the inheritance, not however generally, but as acquired by the feoffment and fine. The uses of the feoffment and fine may then be declared either to the feoffor or a purchaser. See 2 *Saund. Uses*, 26; and *Sugd. Vend. & Pur.* 129, n. (8).

CHAP. IV.

OF A GIFT.

GIFT.

THIS word, in its most extensive signification, imports generally the transferring of the property of a thing from one to another, and is therefore of a larger extent than a feoffment, which is always applied to corporeal and immoveable things only; but this is equally applicable to moveable things, as cattle, household-stuff, &c. the property of which may be altered as well by gift as by sale or grant. And in this latter sense a gift is said to be sometimes by the act of the party; as when a man voluntarily gives a thing to another: and sometimes by act of law; as when a woman is married, or one is made executor to another; in which cases all the goods of the woman are given by the law to the husband, and those of the testator to his executor. So if a man takes my goods as a trespasser, and I recover damages for them upon a suit in law; in this case the law gives him the property of the goods, because he has paid for them^a. But a gift is sometimes, and more properly, taken in a stricter sense, and applied to a conveyance or passing of an estate to another in tail, as feoffment is to that of an estate in fee, and lease to that of an estate for life or years^b. In this sense it differs in nothing from a feoffment, but in the nature of the estate passing by it: for the operative words of conveyance in this case are *do* or *dedi*; and gifts in tail are equally imperfect without livery of seisin, as feoffments in fee-simple^c (1). And

^a Shep. Touch. 226.^c Lit. s. 59.^b Ibid.; Shep. Prac. Couns.

1, 2.

(1) A gift is said by Coke, 1 Rep. 61, to be good by the common law without livery, though not by the civil law; but this it should seem can be understood only of property
not

this is the only distinction that Littleton seems to take, when he says^d, "it is to be understood that there is feoffor and feoffee, donor and donee, lessor and lessee," viz. feoffor is applied to a feoffment in fee-simple; donor to a gift in tail; and lessor to a lease for life, or for years, or at will^e.

It is distinguishable from grants and other modes of transfer in its being properly a voluntary conveyance; that is, a conveyance not founded on the consideration of money or blood, and being therefore, in general, without either a good or a valuable consideration, it is seldom better than of dubious efficacy; as it will be void as against all persons who were creditors of the donor at the time of the gift; but against subsequent creditors it will be good.

This species of assurance will be further noticed under the next head.

^d Lit. s. 57.

^e 2 Blac. Com. 316.

not susceptible of livery, for as no use can arise upon it for want of a consideration, (and where there is a consideration it is more properly a grant) livery is evidently necessary, as it is in respect of gifts of all corporeal things in possession of the donor when the gift is made.

CHAP. V.

OF A GRANT.

GRANT.

IN treating of a grant, we may consider,

- I. ITS NATURE.
- II. WHO MAY CONVEY BY GRANT.
- III. WHAT MAY BE THE SUBJECT OF A GRANT.
- IV. WHAT WORDS ARE NECESSARY TO CONSTITUTE A GRANT: AND,
- V. THE OPERATION OF THIS ASSURANCE.

I. OF THE NATURE OF A GRANT.

A GRANT, in the original and regular signification of the word, is a conveyance or transfer of incorporeal hereditaments (1), of which no livery can be had, such as advowsons, rents, commons, reversions, &c. which are therefore said to lie in grant, and not in livery^a, being "*rei corporalis de persona in personam, de manu in manum translation, aut possessionem inductio; sed res incorporeales, quæ sunt ipsum jus rei vel corpori inharerens; traditionem non patiuntur*"^b. These things therefore pass merely by delivery of the deed: and in seigniories, or reversions of lands, such grants (together with the attornment of the tenant whilst attornments were requisite) were held to be of equal notoriety with, and therefore equivalent to, a feoffment and livery of lands in the immediate possession of the grantor^c. And as livery of seisin could not be had of incorporeal hereditaments, the transfer of them was always made by

^a Co. Lit. 9, a. 172, a.
33s, a; Shep. Prac. Couns. 2.

^b Brac. lib. 2, c. 18.

^c See 2 Blac. Com. 316;
Co. Lit. 384, a, n. (1);
Fearn's Posth. Works, 11.

(1) See of the definition and properties of incorporeal hereditaments, Fearn's Posth. Works, 11.

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Difference between grant and feoffment.

writing, in order to produce that notoriety in the transfer of them, which was produced in the transfer of corporeal hereditaments, by delivery of the possession. But, except that a feoffment was used for the transfer of corporeal hereditaments, and a grant was used for the transfer of incorporeal hereditaments, a feoffment and a grant did not materially differ, and the words *dedi et concessi* were equally used as the operative words of both⁴. Such was the original distinction between a feoffment and a grant; but, from this real difference in their subject matter, a difference was supposed to exist in their operation. A feoffment visibly operated on the possession; a grant could only operate on the right of the party conveying: now, as possession and freehold were synonymous terms, no person being considered to have the possession of the lands but he who had himself, or held for another, at least an estate of freehold in him, a conveyance which was considered as transferring the possession, must necessarily be considered as transferring an estate of freehold; or, to speak more accurately, as transferring the whole fee. But this reasoning could not apply to grants; their essential quality being that of transferring things which did not lie in possession; they therefore could only transfer the right; that is, could only transfer that estate which the party had a right to convey. It is in this sense we are to understand the expressions which frequently occur in our law books, where they describe a feoffment to be a *tortious*, and a grant to be a harmless conveyance. Thus, from a difference in the quality of the hereditaments conveyed by these two modes of conveyance, a difference has been considered to exist in their operation⁵ (1).

⁴ 2 Blac. Com. 317; Co. Lit. 271, b, n. (1). ⁵ Co. Lit. *ub. sup.*

(1) A great part of Mr. Knowler's celebrated argument in the case of *Taylor* on the demise of *Atkins v. Horde*, turns on this distinction. See 1 Burr. 92.

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So there can be no general occupant of things which lie in grant, and which cannot pass without deed, as rents, &c. because these things having no natural existence, but consisting purely in the agreement, and depending on the institution of the society, for their existence, no man can enter to possess them; besides, as these things are framed, and have their existence by the municipal laws of the nation; so those laws have established the solemnity of a deed to transfer them.

II. WHO MAY CONVEY BY GRANT.

Who may convey by grant.

It has been before observed, that no one can convey by *feoffment* who has not a *present* estate of freehold in an hereditament of a *corporeal* nature, because of the operation of a feoffment being by delivery of the possession; but neither corporeality nor possession is necessary for the operation of a *grant*, this species of deed transferring, as we have before observed, the *right* only of the grantor to the thing granted, and whether that right be to the present or future possession. Hence, a person entitled to an estate *incorporeal*, whether in possession or not; or corporeal, if in remainder or reversion, may transfer it by grant¹. The grantor must, however, (contrary to what has been said of a feoffment), have a right to the thing granted: if, therefore, he have no right to it at the time, although he should afterwards become possessed of it, it will not pass by a previous grant of it, notwithstanding that it may be granted by an appropriate description, and was intended to pass when acquired². The reason of this has been mentioned under the head of Feoffment.

III. WHAT MAY BE THE SUBJECT OF A GRANT.

What may be the subject of a grant.

With respect to things transferable by grant, it is observable that some are grantable *de novo*, or in their first

¹ See *Holmes v. Sellers*, 3 Lev. 305.

² Perk. s. 65.

creation, but not afterwards, whilst others are grantable over from one man to another *in infinitum*. But generally speaking, all incorporeal things lying in grant, are grantable over in fee-simple, for life, or years, at pleasure: rents or services, therefore, reserved upon any estate, and rents granted out of lands, are grantable over *in infinitum*; and that even before the grantor has seisin of them ^b (1).

And the grantee of a rent-charge in fee may grant over any part of it; though it hath been objected to these kind of grants or divisions of rent-charges, that thereby the tenant is exposed to several suits and distresses for a thing which in its original creation was entire and recoverable upon one avowry; but the answer to this is, that it is the tenant's own choice, whether he will submit himself to that inconvenience or not, because the grantee, before the 4 & 5 Anne, c. 16, s. 9, could not take any benefit of the grant by distress, without the consent or attornment of the tenant; besides, since the law allowed of such kind of grants, and thereby established such sort of property, it would have been unreasonable and severe to hinder the proprietor to make a proper distribution of it, for the promotion of his children, or to provide for the contingencies of his family, which were in his view^m.

And if a man have a rent reserved on a particular estate he may grant over a parcel of it. But a rent or service suspended cannot be granted. Neither can a man grant a rent issuing out of a rent. And as it is a general rule, that a man cannot grant or charge that which he hath not; if a man grant a rent-charge out of the manor of Dale, and in truth he hath not any thing in the manor of Dale, and

^b Perk. 91; and see 2 45; Co. Lit. 148, a; but Cro. Saund. Uses and Trusts, 33. Eliz. 747, seems contrary.

¹ 9 H. 6, 13; 2 Rol. Abr.

(1) A rent-charge may also be conveyed by fine and recovery, lease and release, bargain and sale, and covenant to stand seised, as well as by grant. See 2 Saund. Uses, 33.

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afterwards he purchase the manor of Dale, yet he shall hold it discharged ^k (1).

But an annuity it seems is not grantable over after the first creation of it, unless it be expressly granted to the assigns of the original grantee^l. If a rent be granted in tail, the grantee cannot grant it over while it continues a rent, because as such, it may be entailed within the statute *de donis*; but if the grantee brings his writ of annuity, it is no longer within the statute, because then it is become a charge merely personal, without any relation to the land out of which it was at first granted, and therefore is become a fee-simple conditional, as such a gift of lands had been before the statute; and therefore the annuity, not being within the statute may be aliened or granted over^m.

Advowsons are grantable in fee-simple, for life, or years, from man to man *in infinitum*, and the grantee may grant it over before he has presented to it; for he can have no seisin of it before it becomes void, and by the grant itself he is seised of the freehold, which he may grant overⁿ. Also the presentation to a church before the church is void, is grantable, but when the church is void, that turn is not grantable, for it is then in the nature of a thing in action (2). Also rectories and tithes, and portions of tithes and pensions, are grantable from man to man *in infinitum*^o.

^k Perk. s. 65.

⁷ Co. 61, *Neville's case*.

^l Ibid. s. 87, 91, 101, 103;

ⁿ 36 Ass. 3; 2 Rol. Abr.

Bro. Grant, 3; Co. Lit.

47, S. C.

144, b. n. (1.)

^o Stat. 32 Hen. 8, cap. 7;

^m Pop. 87; Co. Lit. 19, a; Perk. s. 90.

(1) But where a man having debauched a young woman, and intending afterwards to put a trick on her, made a settlement on her of 30*l.* a year for life, out of an estate he had nothing to do with; yet the Court of Exchequer decreed him to make it good out of an estate he had of his own. Abr. Eq. 87.

(2) And an advowson being limitable to uses, it may also be conveyed by bargain and sale, covenant to stand seised, and lease and release; so may it also by fine or recovery. 2 Saund. Uses and Trusts, 36.

Reversions and remainders, when vested, are grantable from one man to another, in fee-simple, fee-tail, for life or years (1). And if I have a tenancy for life of three houses, I may grant the reversion of two of them. And if I have the reversion of three houses and four acres of land, I may grant the reversion of two houses and of two acres of land. And if there be tenant in tail of an acre of land with remainder to his right heirs, he may grant over this remainder by itself; and yet it is such a thing as the tenant in tail himself may bar by a common recovery. But if a grant be of land to *I. S.* for years, the remainder to the right heirs of *I. D.* and *I. D.* is living; this remainder is not grantable so long as *I. D.* lives².

Commons of pasture, of turbary, of fishing, of estovers, in gross or appurtenant, are also in general, when holden in fee, grantable in fee, for life or years, from man to man in *infinitum*. And the grantee of a common may grant it over before he hath any seisin thereof by the mouths of his cattle, for the freehold is in him by the grant³. But it is said, that if a common in gross, and without number, be granted to a man for life⁴ or years⁵, he cannot grant it over unless the original grant be made to him and his assigns, because of the prejudice it would be to the tenant of the land⁶, and even if it be granted to a man and his heirs, without the word "assign," this it is said is not grantable over to another⁷. But if common for a certain number of beasts be so granted, it seems the law is

¹ Perk. s. 103; Lit. s. 617; West. Synb. pl. 1, s. 294.

² See Shep. Touch. 239; *sed quare*.

³ 36 Ass. 3; 2 Rol. Abr. 47, S. C.

⁴ Ibid.; but see *contra*, 2 Rol. 45; the word "heirs" implying assigns.

⁵ Perk. s. 103.

⁶ 2 Rol. Abr. 46, pl. 16.

(1) So by bargain and sale, lease and release, covenant to stand seised or fine, but not by recovery or feoffment.
2 Saund. Uses, 34.

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otherwise, and that this is grantable over, though the first grant is to the grantee only, and not the grantee and his assigns² (1).

Offices are grantable at first; but the great judicial offices of the kingdom, as the offices of the lord keeper, chief justices, or chief barons, or of other of the justices or barons, and such like, are not grantable over to others; nor the office of sheriff¹. They may however be executed by deputy. Neither are inferior offices of trust, especially if they concern the person of the grantor, grantable over by the officers to any other, unless they be originally granted to them and their assigns: of this sort are the offices of steward, bailiff, receiver, sewer, chamberlain, filacer, and the like. The reversion of an office is not grantable by a subject, but it is by the king, yet a subject may grant an office to hold after the death of the present officer; and this is good².

Licences and authorities are grantable at first for the lives of the parties or for years, but the grantees cannot grant them over; and therefore if power be given to me to make an award or livery of seisin, I cannot grant over this power to another. And if licence be granted me to walk in another man's garden, or to go through another man's ground, I may not give or grant this to another³.

A bare possibility of an interest which is uncertain is not grantable. If, therefore, there be a devise of a tenement to A. for life, remainder to B, B. cannot, in the life-time of A, assign or grant over his interest, because he has but

¹ 3 Rol. Abr. 3.

² Perk. s. 101.

³ Co. Lit. 233; Perk. s. 101; 2 Atk. 332.

⁴ Shep. Touch. 238.

(1) Commons may also not only be transferred by grant, but by release, to the tenant of the land; and common certain may be granted by fine; 1 Cru. 121; but not by recovery; 2 Ibid. 168; it may also be conveyed by bargain and sale, lease and release, or covenant to stand seised. W. Jones, 118; and see 2 Saund. Uses and Trusts, 33.

a bare possibility, for A. may outlive the number of years^b. So if a lease be made to baron and feme for their lives, the remainder to the executors of the survivor of them; the husband cannot grant over the term, because it is but a possibility; for it is uncertain which of them shall be the survivor^c. So if one devise a term to baron and feme for one-and-twenty years, remainder to the survivor of them, neither baron nor feme, during their joint lives, can grant this remainder over^d (1), as which shall survive is a mere possibility.

And if a church is void, the void turn is not grantable by any common person, not only because it is a mere spiritual thing, and annexed to the person of him who is patron, but because during the time of the vacation it is a thing in right, power and authority, a thing in action, and in effect the fruit and execution of the advowson, and not the advowson itself^e; but the next avoidance or avoidances that shall happen, or the inheritance of the advowson, may be granted away^f.

But if the possibility be coupled with some present interest, it is grantable over. And therefore if A. have four houses in execution upon a statute, and by course of time it will endure thirteen years, and afterwards two of the houses are evicted by *elegit* for fifteen years; in this case he, who has the execution upon the statute, may assign over his interest in these two houses; for after the execution by the *elegit* is satisfied, A. shall have the two houses again until he be satisfied^g.

^b Dyer, 116, 244; 4 Co. 66; 5 Co. 34; 10 Co. 47, b; Raym. 146; 1 Sid. 188; and see Chan. Cases, 8, 11; and 2 Vern. 563.

^c Co. Lit. 46; 2 Hol. Abr.

48.

^d Raym. 146.

^e Dyer, 129, b. 282; Leon. 167; Cro. Eliz. 173; And. 16.

^f Owen, 131.

^g Shep. Touch. 239.

(1) *Sed quare*, if it is granted over by husband and wife, and the husband survive, shall not the grant be good against him?

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Also, if a man grant a rent-charge with a clause of distress, and that if the distress be replevied, the grantee may enter and hold till satisfaction; the grantee may grant over the rent with this penalty, although the penalty is but a possibility, for being annexed to the rent, it may well pass together with the rent^b.

A man may also grant that which he hath potentially, though it be not actually in his possession; as if a lessor covenant, that it shall be lawful for the lessee, at the expiration of the lease, to carry away the corn growing on the premises, although by possibility there may be no corn growing at the expiration of the lease, yet the grant is good, for the grantor had such a power in him, and the property shall pass as soon as the corn is extant¹. So if A. lease land to B. for years, and grant that he shall have the natural fruit of the soil, as grass, &c. which shall be on the land at the end of the term; this grant is good, and will pass the property to the grantee². So a person may grant to another all the tithe wool which he shall be entitled to in such a year, though it may happen that he may have no tithe wool in that year³. But a man cannot grant all the wool that shall grow upon his sheep which he shall afterwards buy; for in this case he has neither an actual nor a potential interest in the thing granted⁴.

Nor can rents or other things be granted over during any suspension of their existence, for during that period they are not in existence but only in possibility⁵.

Things, which are incident to other things, are not grantable without the thing to which they are so incident and belonging⁶; and therefore a court-baron, which is inseparably incident to a manor, is not grantable without the

^a 2 Rol. Abr. 48, 49.

¹ Hob. 132, *Grantham v. Hawley*, adjudged; 2 Rol. Abr. 47, 48, S. C. cited.

² Hob. 132; 2 Rol. Abr. 48.

³ Ibid.

⁴ Ibid.

⁵ See Co. Lit. 314; *Perk. s. 88, 89*; *Shep. Touch. 239*.

⁶ 1 Ed. 4, 10.

manor itself; common appendant to land is not grantable without the land to which it is appendant; nor common of estovers appendant to a house, without the house itself to which it belongs^p. Neither can common appurtenant, if it be for cattle *levant* and *couchant*, or without number^q; but otherwise of common appurtenant for a certain number of beasts which may be severed from the soil by grant, and thereby be made common in gross^r.

Franchises, as views of frank-pledge, perquisites of courts-leet, conusance of pleas, fairs, markets, goods of felons, waifs, estrays, hundreds, ferries, or passages, warrens, and the like, are grantable over from man to man, in fee, for life or years, *in infinitum*, because these *inherent solo et solum sequuntur*^s. Also services, and corodies or pensions certain^t. But not a corody incertain, because of the prejudice that may accrue thereby to the original grantor^u.

Things in action^v, or things of like nature, as causes of suit, rights and titles of entry, are not grantable over to strangers, unless in special cases^w. Neither can I grant to another man the suit or action which the law gives to me for recovering my right or possession to a thing. Neither is the benefit of a decree in equity or a suit at law grantable over^x. For the common law hath so utter an abhorrence to any act which may promote maintenance, that regularly it will not suffer any possibility, right of entry, or thing in action, or cause of suit, or title for a condition broken, to be granted or assigned over, but only by release by the tenant to the land, by which means it is extinguished.

^p Perk. s. 104; Cro. Car. 542.

^q *Drury v. Kent*, Cro. Jac. 15; 1 Rol. Abr. 402.

^r Ibid.; and see *Spooner v. Day*, Cro. Car. 432.

^s Shep. Touch. 240; 2 Rol. Abr. 46.

^t Ibid.; Perk. s. 103; 2 Rol. Abr. 45.

^u 2 Rol. Abr. 45.

^v See 2 Blac. Com. 396.

^w 5 Co. 24; 10 Ibid. 48, b. 50; Co. Lit. 214; Dyer, 244; Perk. s. 85, 86, 87.

^x 3 P. Wms. 199.

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So the interest gained upon an execution of a statute or recognizance cannot, without an actual entry of the conveyance to perfect his security, be granted or assigned over to any other person^a.

IV. WHAT WORDS ARE REQUISITE IN THE CONSTITUTION OF A GRANT.

Operative words
of a grant.

THE words "given and granted" are the general and proper words used in this species of deed, and may amount to a grant, gift, release, confirmation, surrender, &c. according to the intent of the parties^b, and it is in the election of the party to use it to which of these purposes he will^c. But the word "grant" itself is the most proper for the transfer of incorporeal hereditaments; it is not, however, absolutely necessary in grants strictly operating as such at common law, by the mere delivery of the deed, and it has therefore been holden that words of covenant^d, or an instrument framed as an obligation^e, may operate as a grant of a way, a rent-charge, or the like; indeed this word seems to be essential in those cases only, where the conveyance by which the incorporeal property is intended to be transferred, is either exclusively adapted to the conveyance of *corporeal* hereditaments, (as a feoffment, &c.) or where, if such conveyance be calculated to pass both corporeal and incorporeal property, as bargain and sale, or the like, some ceremony, necessary to give it efficacy, as the enrollment, is omitted, in which cases no property of an incorporeal nature, it should seem, will pass by way of grant at common law, unless this operative word "grant" be used in the conveyance^f.

^a 3 Lev. 312; *Stephens v. Hanham*, 4 Mod. 48; Show. 290; 2 Salk. 63, pl. 1, S. C. 305; 4 Leon. 147; 2 Ves. 9. Co. Lit. 147, a; 2 Rol. Abr. 424.

^b Co. Lit. 301; 2 Saund. 96, 97, S. P.

^c Co. Lit. 301, b.

^d *Holmes v. Sellers*, 3 Lev.

^e See Lit. a. 541, 542; Co. Lit. 301, b. 384, a. n. (1); Cowp. 609; Cro. Jac. 210; Moor, 34, pl. 113.

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Force of the
word "grant."

The necessity of using the word "grant" in some conveyances, and the evident propriety of using it in others, together with the peculiar force it is supposed to have in operating as a warranty of the title, has given rise to much discussion respecting the propriety of trustees and other persons possessing only a partial estate in the subject of the conveyance, transferring their interest by the word "grant." This question has been particularly noticed and examined by the late Mr. Powell², and by the learned annotator (already so very often referred to) on the latter part of Coke's First Institute³. The observations of Mr. Powell are always entitled to attention, and the author of the present work, at a very early period of his studies, imbibed a very strong partiality for his legal opinions; on the question now alluded to, however, he cannot but concur with the latter gentleman in thinking that the scruples of trustees in this respect ought to be fully satisfied by what is said by Sir Edward Coke¹, and the determination of the Judges in *Noke's case*⁴, and Lord Chief Justice Vaughan's argument in *Hayes v. Bickerstaff*⁵. From which it seems clearly to appear, that the word "grant," when used in the conveyance of an estate of inheritance, does not imply a warranty; and that if it did, the insertion of any express covenant on the part of the grantor, would qualify and restrain its force and operation within the import and effect of that covenant, as the law, when it appears by express words how far the parties designed the warranty should extend, will not carry it farther by construction. There does not appear therefore to be any reasonable ground for trustees objecting to convey by the word "grant;" where serious objections may be raised in *some cases* to purchasers taking a conveyance from them without it⁶. But as in

² See 1 Pow. Wood Conv. 502, n. (a).

³ See Co. Lit. 8vo. 384, a. n. (1).

⁴ Co. Lit. 384, a.

⁵ 4 Rep. 80.

⁶ Vaugh. 126.

⁷ See Co. Lit. 384, a. n. (1); 1 Bridgm. Conv. 323.

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the case of a lease and release, there is no doubt but any thing which lies in grant will vest in the vendee, by the lease for a year; and that a release, without the word "grant," would operate by way of enlargement to give the releasee the fee: and in the case of a bargain and sale enrolled, any thing which lies in grant will vest in the bargainee by the statute of uses without the word "grant;" it is not *in general* essential for a purchaser to require it.

To explain this doctrine more fully to the student, Mr. Butler^a has inquired at some length, into the operation of the word "grant," or "give," in conveyances of estates in fee-simple, in gifts in tail, in leases for life, and in leases for years. With respect to the operation of the word "grant," or "give," in conveyances of estates in *fee-simple*, he observes, that till the practice of sub-infeudation was established by the statute *quia emptores terrarum*, lands might be granted, either to be held of the grantor himself, or to be held of the chief lord of the fee. When they were granted to be held of the grantor himself, at least if the grant were made by the word "*dedi*," there, without any other warranty, the feoffor and his heirs were bound to warranty. This is enacted by the statute *de bigamis*^c, and we have Lord Coke's authority that this statute was only declaratory of the common law in this respect. The reason for implying warranty, in this case, is said by his lordship to be, that, "where *dedi* is accompanied with a perdurable tenure of the feoffor and his heirs, there *dedi* importeth a perdurable warranty for the feoffor and his heirs to the feoffee and his heirs^p." The warranty, in this instance, was therefore a consequence of tenure^d, and so necessary a consequence of it, that where an express and qualified warranty was introduced, it did not restrain or circumscribe the express warranty. Where lands were granted to be held of the chief lord of the fee, there the tenancy was of the chief lord, and no tenure sub-

^a Co. Lit. ub. *supra*.

^c Ch. 6.

^p 2 Inst. 275.

^d See Co. Lit. 101, b.

sisted between the grantor and the grantee. Warranty, therefore, being a consequence of tenure, did not hold in these cases between the grantor and grantee, as there was no tenure between them to raise it. Still the grantor was supposed to be bound by his own gift. The word "give," therefore imported, in this case, a warranty to him. But this was personal to the grantor; it did not apply to the heir, and it could not affect him without working that involuntary alienation, which, in a case of that nature, the jurisprudence of those times did not readily admit. The statute *quia emptores terrarum*, puts an end to the sub-infeudation of fee-simple estates, and of course puts an end to the warranty we have been speaking of, as incident to grants of lands in fee-simple, to be held of the grantor and his heirs. The consequence was, that after the statute *quia emptores terrarum*, there was no case, except that of homage aucestral, in which warranty, unless it arose from the express contract of the parties, bound more than the donor, or bound him longer than the term of his life. But with respect to estates *tail* and leases for *life*, the Judges took this important distinction, that where a person seised in fee granted for life or in tail, reserving the reversion in himself, the grantees of the particular estates held of the reversioner, and he of the chief lord: where a person granted for life or in tail, with the remainder over in fee-simple, both the tenants of the particular estates, and the remainder-men, held of the chief lord. In the former case, therefore, the tenure between the donor and the donees still subsisting, the law remained as it did before the statute, that is, when those estates were created by the word "*dedi*," both the donor and his heirs were, in consequence of the tenure, obliged to warranty. Thus it stood in respect of grants in fee-simple, in tail, or for life; and in all these cases the warranty must be understood in its strict legal import, as implying an obligation in the lord to acquit his tenant against the superior lord, where there was a seigniori paramount, and to give the tenant a recom-

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pence in case of eviction. But in leases for *years* the case is very different. A lease for years is a contract between the lessor and the lessee for the possession and profits of land on the one side, and a recompence, rent, or other income, on the other. As the lessor contracts that the lessee shall hold the land, he cannot claim it in opposition to his covenant; thus he parts with the land during the term; but his supposed parting with the land, and the interest of the lessor in it, during the term parted with, was rather a consequence of law accruing from the contract, than the contract for the enjoyment, a consequence of law accruing from the parting with the land. The tenant, therefore, had only the perception of the profits, and was considered to hold the possession for the reversioner. The consequence was, that whoever recovered the freehold, reduced the term, whether the recovery were true or feigned. As the possession was not considered to be in the lessee, there was originally no means by which he could recover it; his only remedy was in consequence of the contract, which constituted the lease. By virtue of that, the words "yielding and paying," &c. were construed a covenant in favour of the lord, which enabled him to recover his rent by an action of covenant, or an action of debt; and the words "grant, demise," &c. were construed a covenant in favour of the tenant, which enabled him to recover damages as a recompence for the possession lost. In this sense they are said to imply a warranty. From the warranty of freehold estates it differs in its nature, as that arises from tenure, this from contract; and in its operation, as that being a consequence of tenure, is not modelled by express warranties; this, arising from the contract of the parties, is considered to be modified and regulated by any express covenants inserted in the lease. Lord Coke¹ expressly says, that

¹ See *Spencer's case*, 5 Rep. 17; 1 Lev. 57; 1 Mod. 113; and *Clarke v. Semon*, 1 Ves. 101.

² Co. Lit. 101, b. 309, a.

warranty cannot be annexed to chattels real or personal; for, says his lordship, if a man warrants them, the party shall have covenant or action upon the case.

Thus then the law stands since the statute *quia emptores*. In all cases of homage antient, if any such now exist, (which is at least doubtful), the doctrine of warranty remains as it did before the statute; that is, if the grant was made by the word "*dedi*," it imports a warranty. In other cases it may be expressed or not, as the parties think proper: if it be not expressed, then, in conveyances in fee-simple, it is not implied by the word "grant," or any other word except the word "give;" and then it holds only during the life of the grantor: in gifts in tail, and in leases for life, by the word "give," where the reversion is left in the donor, the tenure between him and the donee or lessee still continues. Of that tenure, warranty is a necessary consequence of law, and is not considered to be restrained by any express covenants. In leases for years rendering rent, warranty, considering it to import a covenant for the quiet enjoyment of the term, is of the very essence of the lease; but the lease being originally founded on contract, any of its terms may be varied by the parties themselves at their pleasure, and is in fact considered as varied *pro tunc* by the insertion of any express covenant. But the effect of an express covenant, in restraining the effect of an implied general covenant, is not to be confounded with the effect of a particular covenant in restraining the effect of an express general covenant, as the latter is not restrained by a subsequent covenant, unless it can be considered as part of the general covenant. It may happen, that a person, having a term of years only, conveys the lands as an estate in fee-simple to another and his heirs, by the word "grant;" but this cannot amount to a warranty of the lands for the term. The operation of the word "grant"

¹ See *Noke's case*, 4 Rep. 80; and 1 Saund. 60.

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in implying a warranty in the creation, or assignment of a term, arises from implication only, that is, from the law's presuming, by the party's using the word "grant," that he intended to warrant the lands as a term. But his expressly treating the land in the deed as a fee-simple estate, and expressly conveying it as such, necessarily rebuts every implication of its being his intention or undertaking to convey it as a term of years".

In what has been said above, the grantor is considered as the real owner of the land, receiving the purchase-money, or other consideration of the estate or interest parted with. In this case, independently of all construction of particular words, there is great reason to consider him bound to warranty of the property he parts with, as he receives the benefit of it. In the case of a trustee, this ground of raising or implying an obligation of warranty necessarily fails. Upon the whole, therefore, Mr. Butler concludes that it appears clear, that "whenever there is a deed, on the face of which the trustee is party, and conveys merely as trustee, there is no substantial objection to his conveying by the word "grant." If the lands are freehold, it is clear that no warranty or covenant is imported by it; if it happens that they are held for a term of years only, all implication of an intention or undertaking to convey them for the term, is necessarily rebutted by their being treated in the deed, and conveyed by the party, as a fee-simple estate; and if any such warranty or covenant would otherwise be implied, it would be restrained, by his covenant that he himself has done no act to encumber, to a warranty or covenant against his own acts. To obviate, however, every doubt which may be entertained on this ground, it is usual to make the trustee convey "according to his estate, right, or interest, but not further or otherwise," or to express that he grants, &c. "not as warranting the title, but in order to pass or convey the

* Co. Lit. 384, a.n. (1).

lands." Whenever the former words are inserted, care should be taken to make them referrible to the trustee only, and not to the owner of the fee; who, in express contradiction from the guarded mode of conveyance, applied to the trustee, should be made to "grant," &c. "fully and absolutely" (1)."

IV. OF THE OPERATION OF A DEED OF GRANT.

THIS deed, as we have already noticed, operates not upon the possession as a deed of feoffment does, but upon the actual estate or right only of the party, hence it will pass no more than the grantor has a title to convey, and may therefore be made by a tenant for life, a lessee, &c. without prejudice to his own estate or to that of the reversioner⁷; the reason given for which is, that it being a private or secret conveyance, and not *coram paribus* like the feoffment, it would be dangerous that it should be suffered tortiously to disturb the rights of others⁸.

CHAP. VI.

OF A LEASE.

A LEASE is that species of deed by which the possession of lands or tenements, corporeal or incorporeal, are granted to a person for life, years, or at will¹. The operative

¹ Co. Lit. 384, a. n. (1); Lit. 251, b. 327, b.
but see 1 Pow. Wood, 502, ² Gilb. Ten. 122.
n. (a); Shep. Prac. Couns. 1. ³ 2 Blac. Com. 317; Watk.
⁷ See Lit. s. 627; Co. Princ. c. 4.

(1) See the form of deeds of grant adapted to the transfer of different kinds of incorporeal property, 1 Bridg. Conv. 77; 2 Ibid. 25, 181; Lil. Conv. 611, 773; Horsm. 384, 391; Mod. Prec. 3d edit. vol. iii.

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words of which are usually "demise, grant, and to farm(1), let," although, as has been before observed, any other words, plainly indicating the intent of the parties, that the one shall relinquish, and the other take the possession for a definite period, will amount to a lease^b. And if it be for a term not exceeding three years from the making, it may be by parol; but if it exceed that period, it must be in writing, and signed by the lessor, conformably to the statute of frauds^c. And if for life, it must not only be in writing, but be accompanied by livery of seisin, as in the creation of other freehold interests, unless it be created by way of use, or by devise^d.

But this species of instrument has already been so fully considered, under the head of ESTATES FOR YEARS, as well with respect to what things may be granted on lease^e, who may make leases^f, as the other requisites to constitute a valid lease^g, that it would be improper to dwell upon it again under the present title.

^b *Ante*, vol. ii. p. 596. 395; *Mod. Prec.* 3d edit.

^c 29 Car. 2, c. 3; and see vol. v.

vol. ii. ^e See *ante*, vol. ii. c. 11, s. 2.

^d See various forms of ^f *Ibid.* s. 3.

leases, Lil. 616; 1 *Bridgm.* ^g *Ibid.* s. 4.

15, 164, 190, 259; *Horsm.*

(1) Farm, or feorme, is an old Saxon word, signifying provisions. (*Spelm. Gloss.* 229.) And it came to be used instead of rent or render, because, anciently, the greater part of rents were reserved in provisions; in corn, in poultry, and the like, till the use of money became more frequent: so that a farmer was one who held his lands upon payment of a rent, or feorme; though at present, by a gradual departure from the original sense, the word "farm" is brought to signify the very estate or land so held upon farm or rent. 2 *Blac. Com.* 317.

EXCHANGE. has both a condition and a warranty in law incident and annexed to it, by virtue of the word "exchange," i. e. a condition to give a re-entry to either party upon all the land given in exchange, if he be put out of all or part of the land taken in exchange; and a warranty, to enable him to vouch, and to recover over in value so much of his own land again given in exchange, as shall be recovered from him of the land taken in exchange, so that upon every exchange, either party, if he be evicted, or lose by action the land he takes in exchange, has a double remedy against the other; thus if *A.* exchange land with *B.* and *B.* be put out of all or part of the land upon a title paramount, by a recovery in a real action or otherwise; in this case, *B.* may either enter upon his own land again which he gave in exchange; or else, if it be in an action brought, he may vouch *A.* upon the warranty in law, and shall recover as much in value against him of the land he gave, as he has lost of the land he took in exchange^d; all of which is by reason of the reciprocal consideration, the one land being given in exchange for the other. But this, it is to be observed, is a special warranty (and not like that on common recoveries); for upon voucher, by force of it, he shall not recover other lands in value, but have back the same which were by him given in exchange; for inasmuch as the mutual consideration is the cause of the warranty, it shall extend only to the lands reciprocally given. This warranty also extends to and binds only the parties themselves, or such respectively between whom and the exchangor there is a privity, and therefore none can vouch by force of it but the parties to it, or their heirs, and not an assignee^e.

And it will be the same if either party be evicted of a part only as of the whole of the lands taken in exchange. If then *A.* give three acres in exchange with *B.* for three or any other number of acres, and afterwards *B.* is evicted of one

^d *Bustard's case*, 4 Co. 121.

^e *Ibid.*

acre only, yet the whole exchange shall be void; forasmuch as all the three acres were given in exchange for the others, and the condition imposed in the exchange being entire, it is broken upon the eviction of any part of the land, and entry therefore given into the whole^f: and it will be the same, and for the same reason, if a part of the estate or interest in the land fail; as an estate for life, or other part of the inheritance.

An exchange, in the strict legal sense of the word, cannot be between more than two parties, the principles of it not being applicable to more than two distinct contracting parties, for want of the mutuality and reciprocity on which its operation so entirely depends. For, 1. The consideration of an exchange, and of the implied warranty incident to it, is the receiving something with warranty from the same person to whom something with warranty is given; but if there could be three distinct parties, each would give to one, and receive from another. 2. The implied condition of re-entry is, that re-entry may be made on him whose title fails; but if there could be three parties to an exchange, then each person would be liable to re-entry for the fault of another's title as well as his own^g. The number of individuals between whom the exchange is made, is, however, immaterial, provided that they are so conjoined in the mutuality of giving and receiving in exchange, as to constitute only *two distinct* relative parties. Thus, two or more joint-tenants may exchange with two or more tenants in common: for, in point of interest, the joint-tenants are the conveying party on one side, and the tenants in common on the other; and consequently, there is the same reciprocity as if the transaction was between two persons only^h.

^f *Bustard's case*, 4 Co. 121. part 3, p. 483; and Co. Lit.

^g See the case of *Eton* 50, b, n. (1).

College, in Wilson, vol. 2, ^h Co. Lit. 51, a, n. (1).

EXCHANGE.

Of what an exchange may be made.

II. OF WHAT THINGS AN EXCHANGE MAY BE MADE.

AN exchange may be made not only of things of the same nature, as a house for a house, &c. but of things of different natures, as of a house for land or rent; a temporal thing for a spiritual; a chamber in a house for common, or for a reversion, seignior, or advowson; of land or rent for a right of land or release of right; of an advowson for land; of a rent for a way, or the like. Also, a seignior by homage and fealty, or the like, which is not valuable, may be exchanged for land, rent, or any other such like thing which is so¹. And although the lands exchanged lie in divers counties, the exchange will be good²; with this difference, that if they lie in different counties, the exchange must, it is said, be by deed indented, as it must also, if the thing exchanged lie in grant, though in the same county³.

So, it has been determined, that if one release his estovers in such a wood, and give the release in exchange for land; if a disseisee release his right to the disseisor in exchange for other land⁴; if I have a rent issuing out of the land of another, and I grant or release the same rent to him in exchange for other land; or if I release the rent to him in exchange for a way over his ground⁵; if I be seised of lands for which another hath a right of action, and I give to him other land for a release of his right⁶; all these will be good exchanges⁷. So, if two persons of a church make an exchange of their benefices by words of exchange, and each of them resign his benefice into the hands of the bishop to the same intent, and the patrons present accordingly, and the presentations are by way of exchange, it will be a good exchange⁸.

¹ Perk. s. 258, 259, 260.

² Ibid. s. 258, 261, 262, 263, 266; Lit. s. 62; Co. Lit. 51, 52.

³ Co. Lit. 51, b.

⁴ Perk. s. 271, 282.

⁵ Ibid. s. 267.

⁶ Ibid. s. 268, 269.

⁷ Shep. Touch. 293.

⁸ Perk. s. 257.

Hence, it may be collected, 1. That the things exchanged need not to be *in esse* at the time of the exchange made¹; for a man may grant a rent *de novo* out of his land in exchange for a manor (1). 2. There needs no transmutation of possession; a release of rent, estovers or right of land, for land, being good. 3. The things exchanged need not to be of one nature, so that they concern lands or tenements; as land may be exchanged for rent, common, or any other inheritance which concerns lands or tenements. But annuities, and such like things, which charge the person only, and do not concern lands or tenements, or goods and chattels, cannot be exchanged for land².

III. OF THE REQUISITES TO THE VALIDITY OF AN EXCHANGE.

THE requisites to an exchange are, 1. That the estates exchanged be equal in point of quantity or duration of interest: 2. That the word exchange be made use of in effecting it: 3. That entry or claim be made upon the lands taken in exchange³.

As to the first requisite, viz. that each party have the like kind of estate in the things exchanged; this is not to be understood that it is necessary that the estates should be of equal value, but equal in point of duration or quantity of interest or estate; as fee-simple for fee-simple, a lease of twenty years for a lease of twenty years, and so for other estates. For if the one grant that the other shall have his land in fee-simple for the land which he hath of the other in fee-tail; or that the one shall have in the one land a

Equality of estate necessary in exchange.

¹ But see *contra*, 9 Ed. 4, 21.

² Co. super Lit. 50; Perk. s. 265.

³ Co. Lit. 50, b.

(1) And yet if I grant to another the manor of *A.* for the manor of *B.* which he is to have after his father's death by descent, it seems this exchange is void.

EXCHANGE. fee-tail, and the other in the other land but an estate for life; or that the one shall have in the one land an estate in fee-tail general, and the other in the other land a fee-tail special; or that the one shall have in the one land an estate for life, and the other in the other land an estate for years only; these mutual conveyances cannot take effect as exchanges^a. And therefore if the lord release to his tenant his services in tail in exchange for other lands given to the lord in exchange in tail also, this exchange is void; for by this release made by the lord the services are gone for ever^a. So if the tenant for his own life exchange with him that is tenant for life of another, this is not a good exchange^a. And by the same reason it should seem, if lessee for twenty years of his land, exchange with another for other land for forty years, this would not be a good exchange^a. Or if tenant for his own life exchange with him that is tenant in tail after possibility of issue extinct, this exchange is good^a. For in general the law looks upon an estate-tail after possibility of issue extinct, as equivalent to an estate for life only^b.

Neither is it necessary that both estates be in possession; for one may grant an acre in possession in exchange for an acre in reversion, and this exchange is good^c. Nor, as has been before intimated, is it necessary that there be an equality in the value or quantity of the lands exchanged: for if the land of one of the parties be worth 100*l.* and the land of the other worth but 10*l.* or if the land of one of the parties consist of one hundred acres, and the land of the other but of ten acres, yet if the estates given be equal in point of interest, the exchange is good^d. Neither is equality in the manner

^a Shep. Touch. 296.

^a Perk. s. 283.

^a Perk. s. 275; Finch's Ley, 27.

^a 2 Blac. Com. 323.

^a 11 Co. 80.

^b 2 Blac. Com. 125.

^c Co. Lit. 51; Perk. s. 280, 281, 289; Lit. s. 65.

^d Ibid.

in which the estates are holden by either party material; EXCHANGE. for two joint-tenants, or the like, of land, may exchange them for lands holden by one person in the entirety, and they may take the lands exchanged to hold a moiety to one of them and a moiety to the other, or for other different estates than they had before*.

In every exchange it seems to be essential, that the word *Form of exchange.* "exchange" be used between the parties in making the transfer. As, "I grant to you white acre, to have and to hold to you and your heirs *in exchange* for black acre; and, in consideration hereof, you grant to me and my heirs black acre *in exchange* for white acre:" for the word "exchange" is so individually requisite in this case, that it cannot be supplied by any other word, or circumlocution (unless in the case of an exchange of ecclesiastical preferment); neither will any averment, that it was in exchange, be admitted. And therefore, if A. by deed indented, give to B. an acre of land in fee-simple, or for life, and by the same deed B. give to A. another acre of land in the same manner, this will not enure as proper exchange, but as mutual conveyances; and if, therefore, in this case, there be no livery of seisin or other transmutation of possession, it is utterly void†.

But an exchange may be made to take effect in *futuro*, as well as in *presenti*; for if an exchange be made between me and another, that after the feast of Easter he shall have my manor of Dale in exchange for his manor of Sale, this is a good exchange‡.

It is not necessary in an exchange, any estate, which either party is to have in the thing exchanged, should be mentioned, as in such case they will (the estate being freehold) each take an estate for life. But if an estate for life, or the like, be limited expressly to one, and no

* Co. Lit. 51; Perk. s. 280, s. 252, 254; *Eton College*, 281, 289; Lit. s. 65. 2 Wils. par. 3. p. 483.

† Co. Lit. 50, 51; Perk. § Perk. s. 265.

EXCHANGE.

Entry requisite
in exchange.

express estate is limited to the other, this will not be a good exchange ^a (1).

3dly, We have said that an exchange must be perfected by entry or claim, and which must be in the life-time of the parties; viz. both the parties to the exchange must enter into the things taken in exchange, if they be such things as admit of entry; and if not, must make claim thereto; for until the exchange be executed by entry, or the like, the parties have no freehold in deed or in law in the things exchanged, although the things lie in one county: and if either of the parties die before he enter into the lands by him taken in exchange, the whole exchange is become void, for want of sufficient notoriety, and his heir may enter into the lands conveyed in exchange by his ancestor (2). But if the parties enter at any time during their lives, it is sufficient, unless the possession be before divested by an elder title, as by entry for a condition broken, entry by a disseisee or his heir, or the like, and not re-vested again before the entry. So if two parsons exchange churches, and resign them into the bishop's hands, this is not a perfect exchange until they be inducted; and therefore if either of them die before they be both inducted, the exchange is void, or rather incomplete; and the survivor, even though he himself be inducted, may return back to

^a 19 H. 6, 27; Perk. s. 275.

(1) See the form of a deed of exchange, Horsm. 772; Wilde's Sup. to Mod. Prec. No. 86, 87.

(2) Hence the usual (and it should seem the best) mode of making an exchange (except where either of the parties is a corporate body, or otherwise incapable of standing seised to an use) is by lease and release, or other conveyance founded on the statute of uses; in which case, as the possession is executed by the statute, no entry is necessary; whilst all other incidents annexed to an exchange at common law, will be equally preserved. See Co. Lit. 271, b, n. (1), s. 3.

his own; for, as has been before observed, if, after an EXCHANGE of lands, or other hereditaments, either party be evicted of those which were taken by him in exchange through defect of the other's title, he may return back to the possession of his own by virtue of the implied warranty contained in all exchanges¹. And in case of a reversion, rent or seigniorship being granted in exchange, it was necessary, whilst attornments were in force, that it should be perfected by the attornment of the tenant in the life-time of the parties, otherwise the exchange was void².

And the necessity of entry by the parties renders livery of seisin unnecessary; for entry by the parties being of equal notoriety, supersedes the reason and necessity of livery³. A further consequence of this is, that an exchange may be made by an infant, which like the case of a feoffment will not be void, but only voidable, as well because of the notoriety of entry as the recompence he received; if therefore he continue to hold the land after he becomes of age, the exchange will be indefeasible⁴.

And where an exchange is absolutely void for any of the reasons before given, not only the parties themselves and their heirs, but all privies and strangers, may, for the most part, take advantage of the defect: but when the exchange is only voidable, then parties and privies only can avoid it. And therefore when an exchange is made by an infant, he only when of full age, or his heir, and no other, can avoid it⁵. So, when an exchange is made by a tenant in tail, no other but the issue in tail after the death of his ancestor may avoid it⁶. So, when it is made by the husband, or husband and wife, of the wife's land, it can be

Who may take advantage of a void exchange.

¹ Perk. s. 288; and see Shep. Touch. 297, n. (8); and see *Coventry v. Coventry*, 2 Atk. 369.

¹ Lit. s. 62.

² Co. Lit. 51, b.

³ 4 Co. 122; Perk. s. 290, 294, 296, 298.

⁴ Co. Lit. 50, 51; 1 Co. 98, 105; Perk. s. 284, 286, 289, 292.

⁵ Ibid.

EXCHANGE. avoided only by the wife after the husband's death, or the heir of the wife after her death. So, when an exchange is made by a man *non sana memoria*, it can be avoided by none but his heir^p.

But an exchange, if voidable only and not actually void, may become good by assent of the parties interested; as if an infant exchange lands, and after at his full age occupy the lands taken in exchange as his own, the exchange is by this means made good. So if the issue of tenant in tail occupy the lands taken in exchange by his ancestor, the exchange is made good for the life of such issue. So if the husband and wife exchange the lands of the wife for other land, and she, after her husband's death, agree to it, and enter into the lands taken in exchange, the exchange is made good^q. So if the heir of a man *non sana memoria* enter into the land taken by his ancestor in exchange, the exchange is made good. And in all these cases, when the exchange is once by agreement made good, it can never by any subsequent disagreement be avoided.

CHAP. VIII.

OF A PARTITION.

PARTITION. A DEED of partition is that by which two or more joint-tenants, coparceners, or tenants in common, divide the lands holden by them in joint-tenancy, coparcenary, or common, among themselves in severalty, each taking a distinct part. To effect this, as in some instances there is an unity of interest, and in all an unity of possession, it is necessary that they all mutually convey and assure to each

^p 4 Co. 122; Perk. s. 290,
294, 296, 298.

^q Co. Lit. 51; Perk. s.
279, *et seq.*

other the several estates, which they are to take and enjoy, **PARTITION.** separately. By the common law, coparceners being compellable to make partition, might have made it by parol only; but joint-tenants and tenants in common must always have done it by deed: and in both cases the conveyance must have been perfected *by livery of seisin*^a. And the statutes of 31 Hen. 8, c. 1, and 32 Hen. 8, c. 32, made no alteration in this point. But the statute of frauds^b, abolished this distinction, and made a deed in all cases necessary (1).

The most convenient and usual mode of making partition between joint-tenants, tenants in common, or coparceners by deed, is by lease and release to a trustee, with a limitation of the uses of the several parts of the estate, to those to whom they are intended to be respectively allotted^c.

A partition, like an exchange, implies both a condition and warranty in law, *i. e.* a condition to give re-entry in case of eviction, and a warranty to vouch and have recompence^d (2). And, as in an exchange, the inequality of value in the estates allotted to each other, on the partition, is of no moment, where the parties are of competent age, &c. to contract^e.

^a Lit. 250; Co. Lit. 169;

^d Co. Lit. 174, a. 384, a;

² Blac. Com. 323.

⁴ Co. 121.

^b 29 Car. 2, c. 3.

^e Co. Lit. 51, a. 172, b.

^c See 5 Pow. Prec. 566, 574.

(1) See the form of a deed of partition, 2 Bridg. Conv. 471, 502; Horsm. 764; Wilde's Sup. to Mod. Prec. No. 106, 107.

(2) There is, however, a difference between a recovery in value by force of the warranty upon the exchange, and upon the partition; for upon the exchange the person shall recover a full recompence for all that he loses, but upon the partition he shall recover but the moiety of what is lost, that the loss may be equal. Co. Lit. 174, a. 384, b. where see some other differences between Partitions and Exchanges.

PARTITION. But the doctrine of partitions having already been fully considered in that part of these Elements where the law, relative to joint-tenants, tenants in common, and coparceners, came under our notice, it will be sufficient to refer the student to that place for the distinctions upon this subject^f.

^f See *ante*, b. 2, part 2, 173, b. 174, a. 384, b; c. 8, s. 7; *Ibid.* c. 9, s. 4; *Lit.* s. 255, 256, 257, 258; see also *Co. Lit.* 166, a. and *Coke's Com.* there.

BOOK III.

PART II.

OF DERIVATIVE CONVEYANCES.

CHAP. I.

OF A RELEASE.

HAVING in the preceding book finished our inquiries, RELEASE.
concerning the several species of PRIMARY OR ORIGINAL
conveyances, we now come to those which are of a
SECONDARY OR DERIVATIVE kind; which pre-suppose
some other conveyance precedent, and only serve to en-
large, confirm, alter, restrain, restore or transfer the
interests granted by such original conveyance*. These are,
1st. Deeds of release; 2d. Confirmation; 3d. Surrender;
4th. Assignment; and 5th. Defeasance.

As the first of these assurances is one of those which
compose the very common species of conveyance, known
by the appellation of LEASE and RELEASE, and upon
which the operation of that assurance greatly depends, it
will be proper to enter pretty fully into the nature of a
release; I shall therefore inquire,

I. OF THE GENERAL NATURE OF A RELEASE.

II. OF THE DIFFERENT KINDS OF RELEASES.

III., WHAT PERSONS ARE CAPABLE OF GIVING A
RELEASE.

IV. WHAT MAY BE THE SUBJECT OF A RELEASE.

V. HOW A RELEASE SHALL BE CONSTRUED.

* See 2 Blac. Com. 324.

RELEASE.

I. OF THE GENERAL NATURE OF A RELEASE.

At common law, lands, we have seen, could be transferred from one person to another only by feoffment with livery of seisin producing a notoriety of the transmutation of possession: there was a similar notoriety in the change of possession where a person disseised another, but that was only a tortious possession, liable to be defeated by the disseisee, who had the right: to complete the title of the disseisor, where the party disseised was willing to transfer his right to the disseisor, it was necessary that he should acquire the right; this could not be done by a feoffment, as that was a transfer of the possession, but this the disseisor already had; it was therefore effected by a release, which is the giving or discharging of a right of action which a man has against another, or the conveyance or discharge of a man's interest or right in lands or tenements to another, who has either the possession thereof, or some estate therein^b.

Releases are either express, or in deed, or by operation of law; and may be made of lands and tenements; goods and chattels: actions real, personal and mixt^c, or other rights or interests, varying only according to the nature of the case, and the purposes which the release is intended to effect^d.

The proper words for creating an express release are, "remise, release, and quit-claim (1)," which have all the same signification; and Lord Coke adds two others, viz. "renounced and acquitted." But any other words

^b 2 Blac. Com. 324; Shep. ^c Co. Lit. 264, a.
 Prac. Couns. 2; Gilb. Ten. ^d See Hob. 168; 4 Co. 63;
 53. 8 Ibid. 152; Co. Lit. 286.

(1) The word "release," is, says Lit. s. 508, and Co. Lit. 291, b. the strongest word in the law, and will discharge all sorts of actions, rights and titles, conditions before and after breach, executions, appeals, rents of all kinds, covenants, contracts, recognizances, statutes, &c.

and expressions of a like import will amount to a release^e. RELEASE.

An express release must regularly be in writing, and if the estate released arose by deed, this writing must also be by deed, according to the rule of law, that *eadum modo quo oritur eodum modo dissolvitur*; and so a duty arising by record must be discharged by matter of record, &c.^f

Releases by operation of law may be where an obligor makes the obligee his executor, and he accepts of the executorship; this is a release in law of the action^g: so if the obligee makes the obligor his executor, this is a release in law, because it is the proper act of the obligee, who thereby makes the executor the only person capable to receive and pay, &c.^h

Of releases by
operation of
law.

And what is here observed respecting obligors and obligees, holds equally between all other creditors and debtors, but it must be attended with the following observations: a debt is only a right to recover the amount of the debt by way of action; and, as an executor cannot maintain an action against himself, or against a co-executor, the testator, by appointing the debtor an executor of his will, discharges the action, and consequently discharges the debt. Still, however, when the creditor makes the debtor his executor, it is to be considered but as a specific bequest or legacy, devised to the debtor to pay the debt; and therefore, like other legacies, it is not to be paid or retained till the debts are satisfied; and if there are not assets for the payment of the debts, the executor is answerable for it to the creditors. In this case, it is the same whether the executor accepts or refuses the executorship. On the other hand, if the debtor makes the creditor his executor, and the creditor accepts the executorship, if there are assets, he may

^e Lit. s. 445; Co. Lit. 264. b; and see Plow. 140; 1 Sid. 265; Cro. Jac. 696; 9 Co. 52; Show. 331.

^f Co. Lit. 264, b; 2 Rol. Abr. 408.

^g Co. Lit. 264; Plow. 184, 185; Hutt. 128.

^h 8 Co. 136; 2 Salk. 306.

RELEASE.

retain his debt out of the assets, against the creditors, in equal degree with himself; but if there are not assets, he may sue the heir, where the heir is bound¹. And therefore, though it is said by Chief Justice Holt, that a creditor making his debtor executor does not operate as a legacy, or amount to a bequest to him of the sum due, but to a payment and release; the meaning of it is, that such executor having assets sufficient to pay the debts and legacies of the testator, is discharged of the debt due from himself, as he by law is entitled to all the residue of the testator's personal estate after payment of debts and legacies; but it hath been adjudged, that in case of a deficiency of assets either for the payment of debts or legacies, such debt is to be deemed assets, and the executor accountable therewith as so much of the testator's personal estate².

And by an intermarriage all contracts between the husband and wife for debts due *in presenti* or *in futuro*, or upon a contingency which may become due during the coverture, are released and extinct, because the husband and wife make but one person in law; and it was holden by Justice Gould, that if there was an express agreement that they should not be released by the intermarriage, it would be void, as inconsistent with the state of matrimony³. But it seems the better opinion, and founded on great variety of cases, that promises, covenants, and agreements for the performance of a thing which is not to happen during the coverture, as payment of money after the husband's decease, are not released by the marriage⁴, for such covenant or promise by the husband is only a future debt on a contingency which cannot happen during the marriage, and that is precedent to the debt; but a bond-debt is a present debt, and the condition is not precedent, but subsequent. And it seems now to be settled, that such

¹ *Wankford v. Wankford*,
1 Salk. 299.

² 2 Salk. 304, 306; Cro.
Car. 373.

³ Co. Lit. 264; 8 Co. 136;
Dyer, 140.

⁴ See Hob. 216, 227; 2
Rol. Abr. 407; 2 Vern. 481.

a bond may be enforced even at *law*. against the heirs of the husband^a. RELEASE.

II. OF THE DIFFERENT KINDS OF RELEASES WITH RESPECT TO THEIR OPERATION.

RELEASES, says Lord Coke, are of four different kinds, *i. e.* 1st, those which enure by way of *mitter le estate*, or passing an estate; 2d, by way of *mitter le droit*, or passing a right; 3d, by way of creation or enlargement of an estate; 4th, by way of extinguishment; and Sir William Blackstone adds a 5th, *viz.* by way of entry and feoffment^c.

1st, Of releases enuring by way of *mitter* or passing an estate. Where two or more become seised of the same estate by a joint title, as by a contract or descent, as joint-tenants or coparceners, and one of them releases his right to the other, such release is said to enure by way of *mitter le estate*^d; for when two several persons came in by the same feudal contract, one of them might discharge to the other the benefit of such feudal contract by a release, because no notoriety was needful, since there was a sufficient notoriety in the prior feudal contract; thus, two coparceners come in to one entire feud, descending from their father, and therefore they may release to each other without any notoriety by feoffment; because they take by reason of the former contract and descent to them, which establishes them in the possession without any notoriety^e; but since coparceners transmit distinct estates to their children, they may also pass such estates by feoffment; for they have in respect of the descending line distinct estates, which they may pass by a distinct feoffment; but joint-tenants can only pass the estate by release, and not by feoffment, properly speaking, for they are in solely by the

Release for passing an estate.

^a *Milburne v. Ewart*, 5 Durnf. & East, 381; and *Hayes dem. Foord v. Foord*, there cited.

^c 2 Com. 325.

^d Co. Lit. 273.

^e Gilb. Ten. 73.

RELEASE.

first feudal contract, and therefore a second feoffment cannot give any other farther title or notoriety, because every person shall be supposed to be in by the elder and most worthy title, which is the prior feoffment, nor is this any injury to a stranger's *precipe*, for he may bring it against them all according to the prior feudal contract; and if any of them disclaim, the rest must defend for the whole, or lose their interest'. So neither can tenants in common release to each other, but they must pass their estate by deed of conveyance, because this estate being established by different notorieties, each having passed by distinct liveries, they must pass to each other by a distinguishing livery, else it cannot be known in whom such parts are which formerly had passed by a distinct livery; and against tenants in common, there must be several *precipes*, they having several freeholds'.

So if one joint-copyholder release to his companion, this is good without surrender or admittance, for the first admittance was of them and every of them, and the ability to release was from the first conveyance and admittance'.

And as in releases which operate by *mitter le estate*, the release is supposed to be already seised of the inheritance by virtue of the former feudal contract, and the release only operating as a discharge from the right or pretension of another seised under the same contract, and not as a transfer, no words of inheritance in the release are necessary"; but where the release operates by enlargement, the releasee having no such previous inheritance, and fiefs being either for life or in fee, as they are originally granted, the release gives the estate to the releasee for his life only, unless it be expressly made to him and his heirs". But one tenant in common cannot release to his companion, but each must pass the estate to the other by feoffment and

' Gilb. Ten. 73.

" Co. Lit. 9, 292.

• Co. Lit. 195.

* Co. Lit. 273, b, n. (2);

• Wasev. Pretty, Winch, 3. Gilb. Ten. 74.

livery, or some equiponent conveyance; because tenants in common have distinct freeholds, which, having been created by different acts or liveries, they must pass to each other by different liveries.

RELEASE.

2dly, Of releases operating by way of *mitter le droit*.

Release by
mitter le droit.

Releases are said to enure by way of *mitter le droit* where a person is disseised, and he releases to the disseisor himself, or his feoffee, or to the heir of the disseisor^a, who being in possession, are therefore capable of taking a release of the right; and nothing passing but the right (*droit*), the release is said to enure by way of *mitter le droit*. In which cases, the possession being in the releasee, and the right in the releasor, the uniting of the right to the possession completes the title of the releasee: the different degrees of title, however, in the disseisor, his feoffee, or his heir, give the releases made to them different operations, which will be shown hereafter^a.

3dly, Of releases which enure by way of enlargement.

Of releases
enuring by
enlargement.

Releases enure by way of enlargement when the possession and inheritance are separated for a particular time, and he who hath the reversion or inheritance releaseth to the tenant in possession all his right or interest in the land; such release is said to enlarge his estate, and to be equal to an entry and feoffment, and to amount to a grant and attornment^b, because it transfers the estate in like manner as a feoffment with livery, of corporeal, and a grant and attornment of incorporeal property.

As the release enuring by way of enlargement is that which is used in the conveyance by *lease and release*, it will be proper to be somewhat particular in giving the reader a clear conception of its nature and operation.

In order that a release may take effect by way of enlargement, it is necessary that the releasee, at the time the

^a Lit. s. 466; Co. Lit. 274, Finch, 44; 5 Co. 124^d; Dyer, 276; Gilb. Ten. 55.

^b Gilb. Ten. 54.

^c Co. Lit. 273, a, n. (1);

RELEASE. release is made, should be in actual possession of, or at least have a vested interest in, the lands intended to be released^c; and that there should be privity between him and the releasor.

And whenever these requisites concur, the release is capable of having this mode of operation, and therefore a release by way of enlargement may be made to tenants in dower, or by the curtesy, they having possession, and privity of estate with respect to the releasor^d. So, if there be lessee for life or years in possession, the lessor may enlarge those estates by release to the lessee; and if the lessor grant over the reversion, the estate or interest of the grantee or assignee may be enlarged by the release of him in reversion^e. So, if there be a lessee for life, remainder in tail, the remainder in fee, he in remainder in fee may enlarge the estate of the lessee by release, for notwithstanding the mesne remainder^f, there is possession and privity. But if a man lease for twenty years, and the lessee assigns for ten years, a release by the reversioner to the assignee is void for want of privity: a release to the lessee is however good, for he hath the possession notwithstanding the assignment; the possession of the lessee being always considered the possession of the lessor, he holding as his bailiff^g.

And if a man make a lease for years, the remainder for life, and afterwards releases to the tenant for years, this is good, because the tenant for years holds of the reversioner, and pays him the services, and ought, at common law, to attorn to his grants, and not he in the remainder for life; and therefore where tenant for years accepts a release of the reversion, it must consequently be good; and in this case a release to him in the remainder for life would be good likewise, because the lessee in the original

^c Co. Lit. 270, a, n. (3).

^d 2 Rol. Abr. 400, 401.

^e Co. Lit. 273, a; 2 Rol. Abr. 401.

^f 44 Ass. 35; but see Brownl. 207.

^g Co. Lit. 270; Dyer, 4, pl. 2; Carter, 62.

creation took the estate for years, subject to such remainder for life, and therefore there needs no consent from the lessee for years to enlarge the estate into a fee^b.

RELEASE.

But a man must not only have an immediate relation, but he must have possession of the estate; for if he has assigned it over to another, there can be no such possession upon which a release can operate; for it would destroy the solemnity of contracting, if the release were to pass the estate, and charge the tenant when the party was not really in possession. Therefore, if tenant by the curtesy grants over his estate, he is not afterwards capable of taking a release, for his estate is created merely by law, and he remains tenant to the heir¹, and subject to waste, and was formerly compellable to attorn to the grants of the reversioner; and he has no possession *in pais*, which may be enlarged into a fee^k.

But the grantee of tenant in dower, or by the curtesy, is capable of taking a release, because of the privity and notoriety of possession^l.

So if a feme covert be tenant for life, a release to the husband and his heirs is good; for there is both privity and an estate in the husband, upon which the release may sufficiently enure by way of enlargement; for by the intermarriage he gains a freehold in right of his wife^m.

So if a man make a lease for life, the remainder for life, and the first lessee dies, a release to him in the remainder, and to his heirs, is good, before he enters, to enlarge his estate, because he hath an estate of a freehold in law in him, which may be enlarged by release before entry.

Also, if an advowson be granted for years, the patronage for years is in the grantee, and he may accept a release in fee of the patron; but if one, two, or three avoidances

^a Co. Lit. 273.

¹ 2 Rol. Abr. 400, 401.

^l *Quere* to the lord? See

^m Co. Lit. 273, b; Keilw.

Watk. Desc. c. 1, s. 3.

129, pl. 97.

^k Co. Lit. 273, a.

ⁿ Co. Lit. 270, b.

RELEASE.

are granted, the patronage is not separated, nor can such grantee accept of a release in fee of the patron in fee who hath the inheritance^o.

Also, if a man seised of a rent in fee grants it for life, he may enlarge it by release^p.

A release by a lessor to his lessee at will, having entered by force of such lease, is also good in respect of the privity between them; and it would be a vain thing for the lessor to make livery and seisin to one already in possession of the land by his own agreement^q. But if tenant at will makes a lease for years, and the lessee enters, he is a disseisor, and a release or confirmation to the tenant at will afterwards is void, because the privity is determined^r. And a release to a tenant at sufferance, as where lessee for years holds over, is void; for though there is a possession, yet there is no privity, which is equally requisite^s.

But a release to a lessee for years only, *before entry*, will be no enlargement of the estate of the lessee, he having, till entry, neither a possession nor a vested interest, but an *interesse termini* only^t; but otherwise after entry.

All then that is requisite to give operation to a release of lands for the purpose of enlarging the particular estate into a fee, it will be perceived, is actual possession or a vested interest in the releasee, and a privity of estate between him and the releasor. Hence the expense of a bargain and sale for a year, to give possession previous to a release of the reversion, may frequently be avoided; for a release by trustees to uses, to their *cestui que use*, or *cestui que trust*, would alone transfer to him the fee^u. So a release by the owner to a tenant by *elegit*, statute-merchant, or statute-

^o Jon. 19.

^p 43 Ass. 8; 2 Rol. Abr. 400.

^q Co. Lit. 270, b; Lit. s. 460, 461; Dyer, 269, b, pl. 20; Owen, 28, 29, S.P.

^r *Shaw v. Barber*, Cro. Eliz. 830.

^s Co. Lit. 270, b; Dyer, 28, pl. 19; Cro. Eliz. 268; 3 Leon. 152; Brownl. 207; Cro. Jac. 170.

^t Lit. s. 459; Co. Lit. 270, a.

^u See Lit. s. 462, 463, 464; Co. Lit. 271, a.

staple². So if a feme covert be tenant for life, she may by release only transfer such estate to her husband⁷. **RELEASE**

4thly, Of releases enuring by way of extinguishment.

Of releases
by way of ex-
tinguishment.

In some cases, where the releasee cannot have the thing released by way of *mitten le droit*, &c. or enlargement, yet the release shall enure by way of extinguishment against all other persons; as when the lord releases his seigniority to his tenant of the land, or when the grantee of a rent-charge or common releases to the tenant, such releases absolutely extinguish the rent, the services, or the common, though the releasee be only tenant for life²; for the tenant cannot have services or rent to receive of himself, nor take common in his own hands. So, if a lease be made to one for life, reserving rent to the lessor and his heirs; if the lessee be disseised, and after the lessor releases to the lessee and his heirs all his right in the land, and after the lessee enters; in this case the rent is extinct, but the right of the reversion doth not pass².

And if a lease be made to one for years, reserving a rent, and the lessor, before the lessee's entry, release to him the reversion, this will effect an extinguishment of the rent, although it cannot until entry, as has been before observed, operate as an enlargement².

Also, if tenant for life demises his land to another for the life of the lessee, with remainder over to a third person in fee, and the reversioner release to the lessee, he will be for ever barred; not, however, by reason of the release enuring by way of *mitten le droit*, which it does not, for then should he have the whole right, nor by way of enlargement, for at the time of executing the release he had not an actual reversion, which had been disposed of by the tenant for life, but only a right to the reversion; the bar is therefore by way of extinguishment of right².

² Co. Lit. 270, b.

² Lit. s. 456.

⁷ Ibid. 273, b.

² Co. Lit. 270, a.

² Lit. s. 479; Co. Lit.

² Lit. s. 470; Co. Lit.

279, b. 280, a.

270, a.

RELEASE.

It is here to be noted, that before the statute of *quia emptores*, if a man had aliened, the feud was forfeited; but afterwards that was compounded for fines: but the lord could then only demand a certain composition; and because the tenant had sworn fealty, he could not withdraw himself out of the feudal service during life, but after the death of the feoffee, the lord was enforced to take the feoffee for his tenant; for the lord could not introduce the heir into the feud, contrary to the alienation of the ancestor. And after the statute of *quia emptores*, the lord could avow upon the feoffor till the arrears were tendered: but both before and after the statute, by acceptance of the feoffee, he became his tenant; for it is a plain consent to the alienation. So in terms; if a termor assigns, and the landlord accepts rent from the assignee, he can have no action against the termor, because the rent is a service, which being taken from the assignee, establishes him in the term, and he cannot demand the service but from the tenant of the land; but where there is no such acceptance, if the termor assigns in his life-time, or the executor after his decease, yet an action of debt lies for the rent against the executor; for a term for years being the smallest estate, is presumed to continue in the person, and the contract is supposed to be performed by that person, unless he accept another tenant: and that person has a continuance to perform all contracts as long as there is an executor that represents him, and has assets to perform his contracts^a. But a man may have an action of covenant on the covenants in the lease, after the acceptance of the assignee for his tenant; because, though the acceptance discharges the tenant from the action of debt, because it discharges the service by accepting another, yet without legal words and a solemn contract in writing, the covenant cannot be discharged; for *selectur eo figurine quo ligatum est*^c.

^a 5 Co. 24; 1 Sid. 286. Car. 188, 465—470; Gilb.
^c Cro. Jac. 309, 522; Cro. Ten. 67.

5. Lastly, a release may enure by way of entry and feoffment^f. As if there be two joint disseisors, and the disseisee release to one of them, he shall be sole seised, and shall keep out his former companion; which is the same in effect as if the disseisee had entered, and thereby put an end to the disseisin, and afterwards enfeoffed one of the disseisors in fee^g.

RELEASE.

Release enuring as an entry and feoffment.

III. WHAT PERSONS ARE CAPABLE OF MAKING A RELEASE.

GENERALLY speaking, all persons may relinquish or release their right to lands or tenements, or other interests; subject only to the operation of the release being varied in its extent, according to the interest of the releasor, as whether sole or joint, whether possessed in his own right or in right of another, and the like.

Thus, one joint-tenant of a rent in *fee* may release all his right to the reversioner, but this will not pass the moiety of his companion; but otherwise as to *personal* things, of which one joint-tenant may release the whole, unless the personalty be mixed with the realty^h.

So inhabitants of ancient messuages, entitled to have common by reason of their commorancy, cannot release it; for though one inhabitant, or set of inhabitants, should release it, a succeeding one might claim itⁱ.

So churchwardens, having nothing but to the use of the parish, and the corporation consisting of both, one only cannot release or give away the goods of the church^k.

Nor can the ordinary release an administration bond^l.

An executor may, before probate of the will, release a debt due to the testator, for he derives his authority from

Releases by executors, &c.

^f 2 Blac. Com. 325.

^g Co. Lit. 278.

^h 2 Rol. Abr. 481.

ⁱ *Smith v. Gatewood*, Cro. Jac. 152.

^k March, 73; Jenk. 305;

Cro. Jac. 235; Yelv. 173;

^l 2 Brownl. 215.

^m Holt's Rep. 660; Comb. 263.

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the testator, and not from the act of the ordinary; in like manner may he take releases for debts paid by him^m.

And if there be two executors, and one of them release a debt due to the testator, this shall bind both, for each hath an entire authority and interest different from other joint-tenants; and hence it is held, that if one executor release to his companion, nothing passes, because each was possessed of the whole beforeⁿ.

So if there be two administrators, and one of them release a bond due to the intestate, this shall bind his companion, and be a good discharge to the obligor; as the statute 31 Ed. 3, cap. 11, gives an administrator the same power over debts due to an intestate as an executor had, and an administrator by releasing without consideration is equally liable to a *devastavit* with an executor^o (1).

An infant executor, upon an actual payment and full satisfaction made to him, may release a debt due to his testator, but cannot without, for that this would be a *devastavit* in him^p.

And it has been held, that if there are two executors, and they join in a receipt, and one only receives the money, as to creditors, who are to have the utmost benefit of the law, each is liable for the whole, though one executor alone might have released, and the joining of the other

^m 5 Co. 28; Off. Exec. 33; Plow. 281.

^o *Williams v. Pen*, Pas. 11 Geo. 2, in B. R.

ⁿ Bac. Abr. 8vo. 700.

^p 5 Co. 27; Co. Lit. 172; And. 177; Moor, 146.

(1) In the case of *Hudson v. Hudson*, M. 1737, in Chan. Lord Hardwicke was of a contrary opinion, on the difference the law makes between an executor and an administrator; the former coming in not by the act of the ordinary, but by the will of the testator, consequently, his authority and interest in the assets is greater, &c. The law, however, is as stated in the text; the opinion of Lord Hardwicke in *Hudson v. Hudson* being applicable only to the particular circumstance of that case. *Jacomb v. Harwood*, 2 Ves. 265.

was unnecessary; but as to legatees, and those claiming distribution who have no remedy but in equity, the receipt of one executor shall not charge the other, for the joining in the receipt is only matter of form; the substantial part is the actual receiving, and this only is regarded in conscience¹.

RELEASE.

A husband by the intermarriage acquires such an interest in all debts due to the wife, that he may release them, and such release shall bind the wife¹. And the husband alone may release waste done by lessee for life before coverture, upon a lease made by the feme². So all rights accruing to the wife during coverture, may be released by the husband³. Thus the husband may release the wife's right under the statute of distribution⁴. And though the husband and wife are divorced *a mensa et thoro*, yet the husband may release a legacy, &c. left to her⁵. So where a legacy was given to a feme covert who lived separate from her husband, and the executor paid it to the feme, and took her receipt for it; on a bill brought by the husband against the executor, he was decreed to pay it over again with interest⁷. Also, if a feme covert sue a woman in the spiritual court for adultery with her husband, and obtain a sentence against her and costs, the husband may release those costs, for the marriage continues, and whatever accrues to the wife during coverture belongs to the husband⁸. But if the husband and wife be divorced *a mensa et thoro*, and the wife has her alimony, and sues for defamation or other injury, and there has costs, and the husband release them, this shall not bar the wife, for these costs come in lieu of what she hath spent out of her ali-

Release by husband.

¹ 1 Salk. 318, pl. 26, per
Ld. Harcourt; and see *Scur-*
field v. Howes, 3 Bro. Cha.

Ca. 90.

⁷ 17 Edw. 3, 66; 2 Rol.
Abr. 410.

⁸ 42 Edw. 3, 18; 2 Rol.
Abr. 402.

¹ 1 Salk. 115, pl. 4; Lord
Raym. 73.

² Lucas, 63.

³ Moor, 665; Cro. Eliz.
908; Noy, 45.

⁴ Vern. 261.

⁵ 1 Salk. 115, pl. 4, per
Holt, Ch. J.; Ld. Raym. 7.

RELEASE. money, which is a separate maintenance, and not in the power of her husband^a.

IV. WHAT MAY BE THE SUBJECT OF A RELEASE.

Release of possibilities.

It was an established maxim of the common law, that a mere possibility, right, title, or any other estate in the land or thing that was not in possession or vested in right, could not be released to a stranger, because a release supposes a right in being, and it was thought to countenance maintenance, and multiply contentions and suits, to transfer choses in action, possibilities and contingent interests^b. Hence it is held, that an heir at law cannot release to his father's disseisor in the life-time of the father, for the heirship of the heir is a contingent thing, for he may die in the life-time of the father, or the father may alien the lands^c; and hence, therefore, such a release would be void, and the son might enter upon the father's death, notwithstanding his release^d: and though the words "*qua quovis modo in futuro habere potero*" are inserted in the release, it will make no difference; but if the heir releases with warranty, it bars him when the right descends^e, for the warranty being a covenant for the defence of lands by a man's own act, is made equal to a feudal contract, and therefore repels the party or his heirs from claiming it, since he is bound to defend it to another^f.

So if the conusee of a statute release to the conusor all his right to the land, yet he may afterwards sue out execution, for he has no right to the land, but only a possibility^g. So if a creditor release to his debtor all the

^a 2 Rol. Rep. 426; 2 Rol. Dev. 140; but *quare*, if by Abr. 343; 3 Bulst. 264. indenture, would it not operate as an estoppel?

^b *Lampet's case*, 10 Co. 41, a; Cro. Eliz. 552.

^c Lit. s. 446; Co. Lit. 265, a; 10 Co. 51; Bridgm. 76, S. P.

^d Co. Lit. 265, a; Gilb.

^e 2 Leon. 20; Hob. 130.

^f Gilb. Ten. 53.

^g And. 133; Co. Lit. 265; Cro. Eliz. 552; 2 Rol. Abr. 405.

right and title which he hath to his lands, and afterwards gets judgment against him, he may extend a moiety of the same land, for he had no right to the land at the time of the release, and the land is not bound but in respect to the person^a. So if the plaintiff release all demands to the bail in the King's Bench, and afterwards judgment be given against the principal, execution may be sued against the bail, for that at the time of the release there was only a possibility of the bail becoming chargeable¹.

And where there was a lease to the husband and wife for life, the remainder to the survivor of them for twenty-one years, and the husband granted it over; though the husband survived, the grant was held void because it was contingent².

And if the next presentation to a church be granted to A. and B. and, living the incumbent, A. release all his estate, title and interest to B. this release is void, it being of a chose in action; but it would have been otherwise had the release been made after the avoidance, at which time the interest would have been vested in A¹.

And for these reasons it was held, at common law, that if a woman before marriage had accepted of a jointure in bar and satisfaction of dower, this would not have bound her, because at the time she had no right to dower². And in the case of *Theobald v. Duffay*³, it was determined, that a possibility of a term is assignable for a good consideration.

But it is laid down in *Hoe's* case, that a duty uncertain at first, which upon a condition precedent is to be made certain afterwards, is but a possibility, which cannot be released⁴; as a *nomine pend* waiting on a rent, which

^a 2 Mod. 281; 2 Lev. 215.

¹ 5 Co. 70; *Hoe's* case, Co. Lit. 285; Moor, 469; Cro. Eliz. 579; Hutt. 17; and see the case of *Harrison v. Hurley*, Moor, 852.

² Poph. 5; 10 Co. 51; Hutt. 17; Raym. 146.

¹ Cro. Eliz. 173, 606; Owen, 85; Leon. 167; 3 Leon. 256; Dyer, 244; 10 Co. 48.

² *Vernon's* case, 4 Co. 1.

³ Dom. Proc. March, 1709.

⁴ 5 Co. 70; 2 Mod. 281.

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cannot be released till the rent is behind, for it is the non-payment of the rent which makes the *nomine pæne* a duty^p. So, if a man covenants to pay 10*l.* on the birth of a child, the covenantor cannot be released of the 10*l.* it resting merely in contingency, whether such child will ever be born or not^q. So, if an award be, that upon the plaintiff's delivering the defendant by a certain day a load of hay, the defendant shall pay him 10*l.*; in this case the 10*l.* cannot be released before the day, for it rests merely in possibility and contingency whether the money shall ever be paid, for it becomes a duty on the delivery of the hay only, and not before^r.

It is nevertheless to be observed, that although, for the reason before given, mere possibilities cannot be released to strangers, yet rights, titles and actions, and other possibilities may be released to the terretenant himself; for this has no tendency to create, but to prevent contention and suits, and secure repose and quiet; and therefore, says Coke^s, a right or title to an estate of freehold, be it in *presenti* or *futuro*, may be released, and that in five manner of ways; viz. 1. To the tenant of the freehold in fact or in law, and without there being any privity: 2. To the person in remainder: 3. To the person seised in reversion, without privity: 4. To a person who has right in respect of privity only, (as if tenant be disseised, the lord may release his services, in respect of the privity and right, without any estate): 5. In respect of privity only without right, (as if tenant in tail enfeoff in fee; although the donee after the feoffment has no right, yet there being a privity between them, the donor may release to him the rent and all services, saving fealty).

^p *Bridges v. Emion*, Yelv. 215; Brownl. 116.

^q *Neale v. Sheffield*, Yelv. 192.

^r *Briscot v. Aier*, Yelv. 215; and see 2 Rol. Abr.

407, 408.

^s 10 Rep. 48, 2.

V. HOW A RELEASE SHALL BE CONSTRUED.

RELEASES were formerly construed with great nicety and strictness, and being considered as the deed or grant of the releasing party, were, according to the rule of law that every deed shall be taken strongest against himself, taken most strongly against the releasor¹. They have since, however, received the same interpretation as other deeds and contracts between parties, and are equally favoured by the Judges, as tending to repose and quietness². Hence it hath been established as a general rule in the construction of releases, that though where there are general words only in a release, they shall be taken most strongly against the releasor; yet, where there is a particular recital in a deed, and then general words follow, the general words shall be qualified by the particular recital, and the intention of the parties be pursued³.

Thus, where in debt upon an obligation the defendant pleaded a release of all errors, and all actions, suits and writs of error whatsoever; it was adjudged that the release extended only to writs of error, and did not release the obligation, though the word "actions," had it stood singly, would have done it⁴.

So a release made in performance of an award, was held not to discharge a growing rent, though the release contained general words, extending to it, for "that it was not the intention of the parties⁵."

And it seems that a general release of all actions, &c. from the beginning of the world up to the day of the date of the said release, will not include any cause of action

¹ Dyer, 56, 57, a; Plow. 289.

² Hetl. 15; 8 Co. 148; Show. 154.

³ Hob. 74; Mod. 99; Ld. Raym. 235, 663; *sed vide* Raym. 399.

⁴ *Abree v. Page*, Hetl. 9, 15.

⁵ *Hen v. Hanson*, Lev. 99; Sid. 141; and see *Stokes v. Stokes*, 2 Jon. 104.

RELEASE. arising upon the day on which the release is dated, for that day is not included ^a:

Where releases
require words of
inheritance.

Releases also, like other conveyances, regularly require words of inheritance; for as in feoffments there was required the word *heirs* to distinguish the *feud* or fee from such estates as were not hereditary, so it must be inserted in releases which come in the place of feoffments, in cases where the possession was previously in the releasee ^b. If, therefore, a lessor release to his lessee for years, without saying, to him and his heirs, such lessee hath only an estate for life ^c. So, if a release be made to tenant by statute staple, or merchant, or *elegit*, by him in the reversion, of all his right in the land; by this a freehold only passes for the life of the releasee, it being the greatest estate that can pass without apt words of inheritance ^d. And if a lessor release to his lessee *pur autre vie*, as if a man make a lease to *A.* during the life of *B.* and then releases all his estate to *A.* this will give an estate to *A.* for his own life and not for the life of *B.* only, because an estate for a man's own life is considered in law as a greater estate than that for the life of another ^e.

But in releases that enure by way of *mitter le estate*, the word "*heirs*" is not requisite; as, where there are two coparceners, and one of them releases to the other, this gives a fee without the word "*heirs*," because it hath a necessary relation to the estate of which the other was seised ^f. So, if there be two-joint-tenants, and one release to the other, this passeth a fee without the word "*heirs*," because it refers to the whole fee, which they jointly took and are possessed of by force of the first conveyance. But tenants in common have distinct freehold, and cannot

^a *Dixon v. Terry*, 3 Mod. 182.

^b *Gilb. Ten.* 72.

^c *Lit. s.* 465; *Co. Lit.* 273, b; *Jenk.* 200; *Jon.* 328; *Cro. Car.* 335.

^d *Co. Lit.* 275, b.

^e *Co. Lit.* 273, b; 2 *Vent.* 328.

^f *Co. Lit.* 9, 292.

release to each other, nor otherwise enlarge the estates of each other, without proper words of inheritance ^g.

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And a release of a bare right to another for a day or an hour is good, and as absolute as if it were made to him and his heirs; for the disseisee cannot release part of his estate in the right; for, says Coke, as he has no right to any estate but that of which he was seised, therefore he must release his right to that, or none at all ^h.

A release of all demands is said, by Littleton, to be the most effectual release of all others; and Lord Coke says, that the word "demand" is the largest word in law except claim; and that a release of demands discharges all sorts of actions, rights and titles, conditions before or after breach, executions, appeals, rents of all kinds, covenants, annuities, contracts, recognizances, statutes, commons, &c. ⁱ

Release of
claims and
demands.

Thus by a release of all demands, all actions real, personal and mixed, and all actions of appeal, are extinct ^k. So a release of all demands extends (except in the case of the King ^l), to inheritances, and takes away rights of entry, seisure, &c. ^m. And by a release of all demands made to the tenant of the land, a common of pasture shall be extinct ⁿ. A release of all demands will also bar a demand of a relief, because the relief is by reason of the seigniorship to which it belongs ^o. So, by a release of all demands, all manner of executions are gone, for the recoverer cannot sue out a *feri facias*, *capias*, or *elegit*, without a demand ^p.

So by a release of all demands to the conuser of a statute-merchant before the day of payment, the conusee shall be barred of his action, because that the duty is

^g Co. Lit. 9, 200.

^h Ibid. 274.

ⁱ Lit. s. 508; Co. Lit. 291.

^k Lit. s. 509; 8 Co. 154.

^l Bridgm. 124.

^m Co. Lit. 291.

ⁿ Ibid.

^o Cro. Jac. 170.

^p Lit. s. 508; 2 Rol. Abr.

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always in demand¹; (yet if he releases all his right in the land, it is no bar). So a bond conditioned to pay money at a day to come, is a debt and duty presently, and may be discharged by a release of all actions and demands before the day of payment².

But in an action of debt for non-performance of an award made for the payment of money at a day to come, there is no present debt nor any duty before the day of payment is come, and therefore it cannot be discharged before the day by a general release of all actions and demand³. So if a legacy be devised to *J. S.* at the age of twenty-three, though the legatee, after he attains the age of twenty-one, and before the day of payment, may release it, yet by the word "demands" it is not released, but there must be special words for the purpose⁴.

Neither is a release of all demands a discharge of a covenant not broken at the time; as where a lessor, on payment of 60 *l.* to him by the lessee due on a judgment, released to him all demands, it was adjudged that this did not release a covenant for repairs not then broken; though a release of all covenants would have released it⁵. If, however, lessee for life grant over his estate by indenture, reserving rent during the continuance of the estate, and afterwards releases to the assignee all demands this shall discharge the rent, for he had the freehold of the rent in him at the time⁶. So if lessee for years grants over by indenture all his estate, reserving a rent during the term, and afterwards releases to the assignee all demands, this shall release the rent, for though he cannot have an action to demand all the estate, yet this is an estate in him of

¹ Co. Lit. 291; Bridgm.

124.

² Cro. Jac. 300.

³ Yelv. 214; Cro. Jac.

300.

⁴ 10 Co. 51, in *Lampet's* case.

⁵ *Hancock v. Field*, Cro. Jac. 170; 2 Rol. Abr. 407; Noy, 123.

⁶ *Witton v. Big*, 2 Rol. Abr. 408; Cro. Jac. 486; Bridgm. 123; 2 Rol. Rep. 20; Poph. 136.

the rent, and assignable over; and in an action of debt for any arrearages after, he shall claim it as a duty accrued from the said estate; and it shall not be said that the duty arises annually upon the taking of the profits, but it had its commencement and creation by the original reservation and contract^y. But if there be lessee for years rendering rent, and the lessor grant over the reversion, and then the lessee assigns over his estate, and afterwards the assignee of the reversion releases all demands to the first lessee, this shall not release the rent, for that there is neither privity of estate nor of contract between them after the assignment; but if the release had been made to the assignee, it had extinguished the rent^z.

Also, if he who has a rent-charge in fee releases to the tenant of the land all demands from the beginning of the world till the making of the deed of release; this shall discharge all the rent, as well that to come as what is past^a.

And it is said by Littleton and Lord Coke, that by a release of all demands a rent-service shall be released; but this must, it should seem, be intended of a rent-service in gross, as a seignior; for a release of all demands does not discharge rent before it is due, if it be a rent incident to the reversion; for the rent at the time was not only not due, but the consideration, viz. the future enjoyment of the lands, for which the rent was to be given, was not executed^b. Thus, where in an action brought on a covenant in a lease for years to pay the rent reserved, the defendant pleaded a release by the plaintiff of all demands at a day before the rent in question became due; the plaintiff replied, that the release was in performance of an award of

^y 2 Rol. Abr. 408, in the case of *Witton v. Bie*.

^a 20 Ass. pl. 5; 2 Rol. Abr. 408.

^z *Collins v. Harding*, 2 Rol. Abr. 408; Moor, 544; Cro. Eliz. 606.

^b Lit. s. 510; Co. Lit. 291.

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all matters in controversy between the plaintiff and defendant; and upon demurrer, it was adjudged by Foster, Mallet and Windham, that the rent was not discharged by this release, as it became due by the perception of the profits, and was not like to a rent-charge, or a rent-parcel of a seignior; and they held, that this rent being incident to the reversion, and part thereof, was no more released hereby than the reversion itself was; and that this construction should the rather prevail, as it was not the intention of the party to release this rent^c.

Release of
actions, &c.

By a release of all actions, every species of action, whether criminal, real, personal or mixt, are released, and that whether they are cognizable in a court of record or any inferior court^d; and as well actions which he has as an executor, as those in his own right^e; unless expressly declared to be otherwise^f, or unless there be an action of his own for the release to work upon^g. And if a man release all quarrels, complaints and controversies, this is as large as a release of all actions, and releases all causes of action, whether real, personal or mixt, though no action be then depending^h. And a release of all actions real is a good bar in actions mixed; as waste, *quare impedit*, annuity, or the like; and so is a release of actions personalⁱ; unless where the grantee has made his election before the release^k.

But a release of all actions is regularly no bar of an execution, for execution is no action, but begins when the action ends^l. Also, a release of all actions does not regularly release a writ of error, for it is no action, but a commission to the justices to examine the record; but if

^c *Hen v. Hanson*, Lev. 99, 35; Lev. 272; 2 Keb. 530; 100; Sid. 141; Keb. 499; 3 Mod. 379.

and see accord. *Stephens v. Snow*, 2 Salk. 578, pl. 1. ^g 2 Lord Raym. 1307.

^d Co. Lit. 287.

^h Co. Lit. 292.

ⁱ Ibid. 284.

^e 2 Rol. Abr. 404.

^k Jones, 215.

^f *Stokes v. Stokes*, Vent.

^l Co. Lit. 289; 8 Co. 153.

therein the plaintiff may recover, or be restored to any thing, it may be released by the name of action^m. It is said, however, that a release of all actions is a good bar to a *scire facias*, though it be a judicial writ, for the defendant may plead to it, and it is in nature of a new original given by the statuteⁿ. So in replevin a release of all actions is a good bar, for the avowant is defendant, though in some respects he is plaintiff^o.

But though a release of all actions is no bar of a writ of error or an execution, yet a release of all suits is a bar to both, because they cannot be had without application to the court, and prayer of the party, which is his suit^p.

Further, if a disseisee release to the disseisor all actions, this is no release of his right of entry, for when a man has several means to come at his right, he may release one of them, and yet take benefit of the other^q. So if a man by wrong takes away my goods, and I release to him all actions personal, yet by law I may take the goods out of his possession^r.

A release of all actions discharges a bond to pay money on a day to come; for it is *debitum in presenti, quamvis sit solvendum in futuro*; and it is a thing merely in action, and the right of action is in him that releases, though no action will lie when the release is made^s. But a release of actions does not discharge a debt before the day of payment, for it is neither *debitum* nor *solvendum* at the time of the release; nor is it merely a thing in action, for it is grantable over^t. So if a man has an annuity for term of years, for life or in fee, and before it is in arrear releases all actions; this shall not release the annuity, but only for the arrearages

^m 2 Inst. 40; Yelv. 209; Co. Lit. 288.

ⁿ Co. Lit. 290; Comb.

455-

^o 2 Rol. Rep. 75.

^p Latch. 110; Co. Lit. 291; 8 Co. 153.

^q Co. Lit. 28, b; 8 Co. 151.

^r Co. Lit. 286; Skin. 57,

pl. 1.

^s Co. Lit. 292.

^t Ibid.

RELEASE. incurred before^a, for it is not merely in action, but may be granted over².

To whom a release shall enure.

I shall conclude the cases I have adduced upon the construction of releases by an inquiry to whose benefit a release shall enure.

If two or more persons are jointly and severally bound in a bond (unless it be to the king)³, a release to one discharges the others; and in such case the joint remedy being gone, the several is so likewise⁴. And though the release be accompanied by a proviso, that the other obligor shall not take advantage of it, it will make no difference, for such proviso is void⁵. So, if there are two conusees of a statute, and one of them releases to the conusor, this shall extinguish the statute as to the other also⁶. So, if two executors sell the goods of the testator for a certain sum of money, and take an obligation for the money, the release of one of them shall bar them both⁷. So, where there are two executors, and one only has the possession of the goods which are taken away by a stranger; though he only, in whose possession the goods were, may bring an action, yet the release of his companion shall bar him⁸.

And if *A.* be bound to *B.* and *C.* to pay the moiety to *B.* and the other to *C.* this is a several obligation, and the release of one shall not prejudice the other⁹. So, where several enter into several covenants in the same deed, a release to one of the covenantors will not discharge the others¹⁰.

Lastly, it may be observed, that where several persons recover in the personalty, the release of one is a bar to all,

^a 2 Rol. Abr. 404.

² Co. Lit. 292; Bulst. 178; Cro. Eliz. 897; Moor, 133.

³ 5 Co. 56.

⁴ Co. Lit. 232; Moor, 356; 2 Rol. Abr. 410; Hob. 10; 2 Sid. 41; 2 Salk. 574.

⁵ Lit. Rep. 190.

⁶ 2 Rol. Abr. 411.

⁷ 17 E. 3, 66; 2 Rol. Abr. 411.

⁸ Bro. Release, 26.

⁹ Moor, 64.

¹⁰ Cro. Eliz. 408, 470; 2 Salk. 574; 5 Co. 56.

but yet not so in point of discharge^a. As if there are two plaintiffs who are barred by an erroneous judgment, and they afterwards bring a writ of error, the release of one shall bar the other, because they are both actors in a personal thing to charge another, and it shall be presumed a folly in him to join with another who might release all^b. But if an action be brought against four, and judgment against them, on which they bring a writ of error, and the defendant in error plead the release of one of them, this is no bar; for, it being brought to discharge themselves of a judgment, the release of one cannot bar the other, because they have not a joint interest but a joint burden, and by law are compelled to join in a writ of error^c.

CHAP. II.

OF A CONFIRMATION.

IN treating of confirmations it will be sufficient to consider, CONFIRMATION.

I. THE NATURE AND DIFFERENT KINDS OF CONFIRMATIONS.

II. THEIR EFFECTS AND CONSTRUCTION.

I. OF THE NATURE AND DIFFERENT KINDS OF CONFIRMATIONS.

A CONFIRMATION is defined by Coke to be the "conveyance of an estate or right, that one hath *in esse*, in or unto lands or tenements, to another that hath the possession thereof, or some estate therein, whereby a voidable

^a 6 Co. 25, 2; *Ruddock's case*, Cro. Eliz. 648; Jenk. 263; Palm. 319; Owen, 22; Hutton, 40.

^b 3 Mod. 135.
^c Ibid. 109.

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estate is made sure and unavoidable;" or whereby a particular estate is increased and enlarged^a. But by Shepherd, "where a man doth, by his deed, confirm or settle the estate or right that another man already hath in any lands or tenements^b." And Lord Chief Baron Gilbert calls it the approbation or assent to an estate already created, which, as far as in the confirmor's power, makes it good and valid; which seems to be the more accurate definition; as a confirmation does not regularly create an estate, but confirms that which is already in being. Words, however, may be mingled in the confirmation, which may create and therefore enlarge an estate; but then it is by the peculiar force and power of those words, and not by the act of confirmation^c.

An instance of the first branch of this definition is, where tenant for life leases for forty years, and dies during the term, here the lease for life is voidable by him in reversion: yet, if he has confirmed the estate of the lessee for years, before the death of tenant for life, it is no longer voidable but sure^d. The latter branch, or that which tends to the increase of a particular estate, is the same in all respects with that species of release which operates by way of enlargement^e, and requires the same privity of estate and words of limitation^f: if, therefore, lessor for life release to tenant for years in the life-time of tenant for life, the release will be void, for want of privity between the lessor for life and him for years^g.

How a confirmation differs from a release.

A confirmation is often similarized to a release, but though it agrees with a release in some respects, it differs from it in more. The leading distinction, however, appears to be, that a release by passing the right from the releasor may strengthen the estate incidentally and consequentially; but a confirmation strengthens it primarily and directly.

^a Co. Lit. 295, b; Lit. s. 515, 531; Gilb. Ten. 75.
^b Shep. Prac. Couins. 2.
^c Gilb. Ten. 75; Lord Raym. 300.

^d Lit. s. 516.
^e 2 Blac. Com. 326.
^f Co. Lit. 296, a.
^g Lit. s. 517.

A confirmation will also operate in many cases where a release will not. Thus, before the statute of Anne, "if my tenant for life made a lease for years, I could not release to the lessee for years, because there would want the attornment of tenant for life, but I might confirm the estate of tenant for years, for there wanted nothing but my assent to corroborate the estate already in being^b. So now I cannot release to the termor of the disseisor, because he is a perfect stranger to the freehold, so that the release is to one that has no right or possession of his own, and therefore it is to him a release of a naked right; but I may confirm that estate which is already in being in him^c. Again, if a man release to tenant for life all his right, this enures to him in remainder, because he parts with his whole; and he that has but an estate for life, by the feudal conveyance, cannot have the whole fee. But if a man confirm the estate for life, it is an approbation and assent to that estate only, and therefore the assent being no farther than to the estate for life, it cannot be carried to strengthen the remainder; but if he had confirmed the remainder, that had confirmed the estate for life by implication; because the remainder cannot be without a particular estate to support it, therefore the confirmation of the remainder must imply an assent to all means necessary to support it^d.

A confirmation is either express, or in deed; or implied, or in law. It is express, when some act is done intended for a confirmation; it is implied, when the law by construction works a confirmation by a deed made for another purpose^e.

Confirmation express and implied.

A confirmation sometimes tends to confirm and make good a wrongful and defeasible estate, or to make a conditional estate absolute: and then it is said to be *confirmatio perficiens*: and sometimes it serves to increase and enlarge a rightful estate, and so to pass an interest; and then it is

Its general effect.

^b Lit. s. 516, 517; Gilb. Ten. 75.

^c Lit. s. 521; Gilb. Ten. 76.

^d Lit. s. 518.

^e Co. Lit. 295; Plow. 140; Lit. s. 515; 9 Co. 142.

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disseisor, and afterwards he that hath the rightful estate confirms their estates so defeated and gone, these confirmations are void; for *debile fundamentum fallit opus*. 3. The confirmor must have such an estate and property in the thing of which the confirmation is made, as may enable him to confirm the estate to the confirmee; as the lessors, feoffors, and disseisees in the cases before have; otherwise the confirmation is void^a; and therefore if the heir of the disseisee, during the life of the disseisee, confirm to the disseisor, this is no good confirmation to perfect his estate, although the disseisee die, and the right of the land descend to his heir afterwards. So if land be given to A. and B. his wife, and the heirs of their bodies issuing, the remainder in fee to A. and A. levy a fine with proclamations and die, and she within five years enters and claims, and afterwards the connusee confirms the estate made by the first gift to the wife, this confirmation is to no purpose^c. So if lessee for life make a lease for thirty years, and afterwards he in reversion, and the lessee for life, lease for sixty years; in this case he cannot confirm the lease for thirty years, because he hath granted it before for sixty years^d. And hence it is also, that a confirmation by one joint-tenant, of the estate of his companion, is futile and makes no alteration; for their estates are equal, and each has interest in the whole land, and he confirms the estate in the same manner as it was before. And yet if one joint-tenant confirm the whole land to his companion, to hold to him and his heirs, this shall amount to a grant, and so will be good to pass his moiety, and give his companion a sole estate^e, for then he expresses a design of confirming the possession to him alone; so that the confirmation goes to the possession itself, by the explanatory words in the *habendum*, and not to the manner of possessing; and the words of the *habendum* make the confirmation enure as a new grant of such his moiety^b. And hence it is also, that

^a Dyer, 109.^c 9 Co. 138.^d Co. Lit. 296.^e Lit. s. 523; Dyer, 263.^b Gilb. Ten. 78.

if a man grant a rent-charge out of his land to another for life, and then confirm his estate without any clause of distress (for by a clause of distress a grant of a new rent may be made) to hold in fee-simple, or fee-tail, this is void, for the confirmor hath no reversion of the rent in him^c.

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4. The precedent estate must continue until the confirmation come; as in all the cases of voidable estates the confirmation must be before the estates be made void by entry, &c. or otherwise the confirmation will be void. And therefore if lessee for life or years surrender, or the disseisee enter upon the disseisor, and afterwards the lessor or the disseisee confirm the estate of the lessee or disseisor, this confirmation comes too late. 5. The estate precedent, and that which is to be confirmed, must be lawful and not prohibited by any act of parliament^d. And therefore if a spiritual person, as prebend, or the like, make a lease not warranted by the statutes, the confirmation of the dean and chapter will not help nor amend it. And if tenant in tail make a voidable lease, and after confirm it himself, this is voidable still. 6. There must be apt words of confirmation in the deed or instrument. And although the words, "confirmed, ratified and approved," are the most significant and proper words to make this conveyance^e, yet such as are made by other general words may make a good confirmation. And therefore it is agreed, that a deed made by the words "give, grant or demise," may make a good confirmation^f. The words "*dedi et concessi*," being as strong as the word "*confirmavi*," for they amount to a grant of the right of the person in possession; and if he has my right I can never after impeach his estate^g (1).

^c Lit. s. 543; Co. Lit. 308. 147; 5 Ibid. 15; Lord Raym.

^d 5 Co. 15; Lit. s. 607. 49.

^e Lit. s. 520.

^f Gilb. Ten. 79; and n.

^g Lit. s. 531, 532; Co. (d) there.
Lit. 295; Dyer, 116; 1 Co.

(1) Ancient confirmations made after the conquest, often ran like feoffments, with the words, "*dedi, or concessi*,
et

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II. OF THE EFFECT AND CONSTRUCTION OF CONFIRMATIONS.

Confirmation *crescens*, or increasing the estate.

A CONFIRMATION *crescens*, in some cases enlarges the estate of the confirmee, as if the lessor confirm the estate of his lessee for life with this clause, to hold without impeachment of waste, this is a good confirmation to change the quality of the estate, so far as to make it dispunishable of waste. So if lessee for years, or for another's life, be without impeachment of waste, and the lessor confirm to him for his own life, and omit that clause; hereby this privilege is gone, and the estate is become punishable for the waste^b.

This kind of confirmation, must have all the qualities of the former: and there must be also a privity between the confirmor and the confirmee. And then it may enlarge the estate of him to whom it is made, as from an estate at

^b 9 Co. 139; F. N. B. 136; 8 Co. 76; Dyer, 10.

et confirmavi:" and are distinguishable from the feoffments, chiefly by some words importing a former feoffment or grant; as where they run in the same language, with the addition of "*sicut charta facta*," or the like.

In ancient time, when feoffees were frequently disseised of their lands upon some suggestion or other, charters of confirmation seem to have been in great request. For in the early times after the conquest, we meet with so many confirmations successively made to the same persons, or their heirs or successors, of the same lands and possessions, that it looks as if men did not then think themselves secure in their possessions against the king or other great lords, who were their feoffors, or in whose fees their lands lay, unless they had repeated confirmations from the king or his heirs or successors, or the other great lords or their heirs. And these confirmations, very anciently, seem to have been sometimes made either by precept or writ from the king or other lords, to put the feoffees or their heirs or successors into seisin after they had been disseised, or to keep them in their seisin undisturbed, or else by charter of express confirmation." Mad. Formul. Diss. p. 19.

For the form of the modern deed of confirmation, see Lil. Conv. 669; Horsm. 231; Wilde's Sup. No. lxvii. lxviii. lxix.

will to an estate for years, or to a greater estate; from an estate for years, to an estate for life, or to a greater estate; from an estate for life, to an estate in tail, or in fee; and from an estate-tail, to an estate in fee; and these confirmations are good¹. But in all these kinds of confirmations, care must be had of the manner of penning them; and that in every such deed there be a limitation of the estate; *i. e.* that these words be inserted, "to have and to hold the tenements, &c. to him and his heirs; or to him and the heirs of his body; or to him for term of life, or years;" as the agreement is; for if lessee for life make a lease for years, and then lessee for life and he in reversion confirm the land, "to have and to hold to him for life, or to him and his heirs;" these words will make the estate to increase². But if the confirmation be made to the lessee for life or for years of his term or estate, and not of the land; as when he confirms his estate, to have and to hold his estate to him and his heirs, this does not increase the estate¹. The confirmation as to the heirs being void, because the estate is only confirmed, and nothing now is granted by such confirmation; but if he confirm the land, to hold the land to him and his heirs, this will increase the estate, and amount to a grant of the fee; for then there appears to be a further intent than merely to confirm the estate; *viz.* to enlarge it to him and his heirs; and taking the grant strongest against the grantor, it must pass away the fee-simple³.

Also, if the husband have an estate of land for life, or years, in right of his wife; or to them both for life, and a confirmation be made to him alone of his estate, or of the land, to hold the land to him and his heirs, this is a good conveyance of the fee-simple to him after the death of his wife. And if I let land to a woman sole for the term of

¹ 6 Co. 15; 9 Ibid. 142; ¹ Lit. s. 524, 545; Plow. Co. Lit. 305; Dyer, 145, 263, 540.
² 296; Lit. s. 523, 532, 533. ³ Gilb. Ten. 78.
⁴ Shep. Touch. 315.

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her life or years, who takes a husband, and I afterwards confirm the estate of the husband and wife, to hold for term of their two lives, this is good, and enures to enlarge his estate for the term of his life if he survive his wife, for I not only confirm the old term, but erect a new one, since the words import more than a confirmation of the old term; for in that the husband has nothing in his own right^a. But if one make a lease to another for life, and afterwards confirm the estate of the lessee to him and his wife for their two lives, this is void as to his wife^c.

And if one grant a rent-charge out of his land for life, and afterwards the grantor confirm the estate of the grantee in the rent, without any clause of distress, to hold to him in fee-simple or fee-tail, this confirmation is not effectual to enlarge the estate. But if a man be seised of an old rent-charge or rent-service, and grant the same first for life, and afterwards confirm the estate of the grantee in fee-simple or fee-tail, this is good, and will enlarge the estate accordingly^d. And yet if tenant for life grant a rent out of the land, to one and his heirs during the life of the lessee for life, and afterwards the lessor confirm the rent to the grantee and his heirs, it seems the estate is not hereby enlarged, but when the tenant for life dies, the rent shall cease^e.

This kind of confirmation may be made by the same words as the former, viz. by the words, "give, grant or demise." So, if I grant to my lessee for years, that he shall hold the land for term of his life, this without any other words is a good confirmation^f.

Confirmation
diminishing the
estate.

A confirmation *diminuens*, intends a diminution of the estate of the confirmee. Thus, by a confirmation the lord may confirm the estate of his tenant holding by knight's service, to hold in soccage; or to hold for a less rent; or to hold at common law, where before he held in

^a Gilb. Ten. 79.

^c Co. Lit. 299; Plow. 160;
Lit. s. 525.

^d Lit. s. 548, 549.

^e 1 Co. 147.

^f Co. Lit. 301, b.

ancient demesne; and such a confirmation is good. But such a confirmation as is to hold by new services, as a rose for money, or the like, is not good for that purpose. And in this case there must be also a privity. And therefore if there be lord, mesne and tenant, and the lord confirm the estate of the tenant to hold by less services, this is void, for reasons before noticed. And if the lord confirm to his tenant after he is disseised before his entry, to hold by less services, this is void^a.

A confirmation in case of a lease for years, may, by apt words, be for part of the time, but in case of a freehold it cannot be so. And so also it may extend to part of the thing before in estate. And therefore if a disseisor, tenant in tail, or husband of the land he has in the right of his wife, or lessee for life, make a lease for years, and the disseisee, issue in tail, wife or lessor, make a confirmation of all the land for part of the time, or of part of the land for all the time, this confirmation is good. But if any such person make a lease for life, gift in tail, &c. the disseisee, &c. cannot confirm part of the estate, but he must confirm all. And therefore, if he confirm his estate for one hour, it is a confirmation of the whole estate. And so also, if he confirm the land to the disseisor himself but one hour, one week, one year, or for his life, &c. this is a good confirmation of the estate for ever, because the disseisor has the fee, and when that estate is assented to, the disseisee can never afterwards destroy it. And if it be a lease for years that is confirmed, care must be had to the manner of the confirmation: for if the confirmation be of the estate or the term for one hour, this is a good confirmation for the whole time; for the term is confirmed, and the last words, being derogatory from his own grant, must be rejected: and therefore the confirmation must be had of the land, to have and to hold for part of the term; and being

^a 9 Co. 142; Lit. s. 538; Gilb. Ten. 80.

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so made, it may be good for that time only, and no longer^c. Because the party who had the right did not wholly assent by express words, as he did in the two former cases; for if he did, no derogatory clauses from such assent could be admitted; but his assent was originally but partial, and not to the whole estate, and therefore it cannot, contrary to the express words, be carried any further^d.

CHAP. III.

OF A SURRENDER.

SURRENDER.

SURRENDERS are either by the common law, or by custom; but these have both been already considered: that by the common law under the head of **ESTATES FOR YEARS**^a; and the customary surrender under the head of **COPYHOLDS**^b (1).

^c 5 Co. 82; Lit. s. 519, 520; Co. Lit. 297.

^d Gilb. Ten. 76.

^a See *ante*, vol. ii. c. xi. s. v. p. 66; and see also Shep. Touch. c. xvii.

^b See vol. iii. c. i. s. vi.; and see also of this species of surrender, 1 Watk. Copyh. c. iii. and of admission thereon, Ib. c. vi.; and see *post*, of **CONVEYANCES BY SPECIAL CUSTOM**.

(1) For the form of a common law surrender, see 1 Bridgm. Conv. 311; 2 Ibid. 158, 160; and for a surrender of copyholds, Horsm. 280.

CHAP. IV.

OF AN ASSIGNMENT.

ASSIGN-
MENT.

AN assignment may be considered,

- I. WITH RESPECT TO ITS NATURE.
 - II. ITS SUBJECT MATTER, OR WHAT MAY BE THE SUBJECT OF AN ASSIGNMENT.
 - III. THE CIRCUMSTANCES REQUISITE TO ITS VALIDITY:
- AND,
- IV. ITS EFFECT AND OPERATION.

I. OF THE NATURE OF AN ASSIGNMENT.

AN assignment may be defined to be the transferring or making over some estate or interest, already *in esse*, from one person to another, in which sense it includes every species of executed contract which does not create a new estate; but, in its more confined and technical sense, it is usually appropriated to the transfer of some estate, either in chattels, or of equitable interests, in which a third person, not a party to the assignment, has some right or interest^a; and is more particularly applied to an estate for life or for years^b.

The nature of
an assignment.

An assignment differs from a lease only in this, that by a lease, one grants an interest less than his own, reserving to himself a reversion; whilst in an assignment, he parts with his whole property^c: but the real difference between a lease and an assignment, appears to be, not that the first is the parting with a less interest than one's own, and an assignment of the whole of one's interest, but that a lease is the grant of a distinct estate *de novo*, whilst an

^a See 2 Blac. Com. 326; ^b 2 Blac. Com. 326.

¹ Bac. Abr. 8vo. 248.

^c Ibid.

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assignment is the transfer of an old or existing estate. And if this definition of an assignment be correct, the case of *Pultney v. Holmes*^d, (in which it was holden, that an agreement between a lessee and B, that B. should hold the house, &c. for the remainder of his the lessee's term, paying and performing to the lessee the rents and covenants in the original lease, was not an assignment, but an under-lease only, notwithstanding there was no reversion left in the lessee), appears to be far more consonant with the genuine distinction between them, than the later case of *Palmer v. Edwards*^e, where Buller and Willes (absent Mansfield and Ashhurst) held, that every transfer of the whole interest of the lessee will be an assignment, even though the lessee reserve rent, or introduce new covenants into the deed; for in this case the estate which passes from the lessee is evidently, as it appears to me, not the same, but a distinct and separate interest, from that which he received from the lessor, though in the same land and for the same duration.

Hence, notwithstanding the position of Sir William Blackstone, that "the assignee stands, to all intents and purposes, in the place of the assignor^f," founded on the notion that the assignor parts with the precise interest which he received from his lessor, is admitted to be incorrect, since there are many cases in which the assignee of the whole term granted by the lessor is unaffected by the agreements entered into by the lessor and assignor, respecting the thing demised^g, which is wholly irreconcilable with the proposition that the assignee stands in the shoes of the assignor^h.

^d *Stra.* 405.

^e *Dougl.* 187.

^f See 2 *Blac. Com.* 326;
and see 2 *Blac. Rep.* 326,

766; 1 *Pow. Wood*, 563.

^g See *ante*, vol. ii. c. xi.

^h 5 *Co.* 16; 3 *Bur.* 1271;
1 *Dougl.* 174.

II. WHAT MAY BE THE SUBJECT OF AN ASSIGNMENT.

ASSIGN-
MENT.

As an assignment, like every other species of conveyance, is the evidence and execution of a prior contract or agreement, it follows, that whatever may be the subject of an agreement may also be the subject of that species of assurance which is calculated to transfer it to the assignee¹; hence the subject of this section has, in a great measure, been anticipated by the remarks which have been made on the SUBJECT MATTER OF AGREEMENTS²; some few observations are still, however, referrible more particularly to this head.

What may be
assigned.

By the common law, nothing could be assigned over to another but what was in the actual possession of the assignee, "the wisdom and policy of the sages and founders of our law having provided, that no possibility, right, title or thing in action, should be granted or assigned to strangers, lest it should be the occasion of multiplying suits and contentions³." This nicety is now, however, disregarded, and our courts of equity considering that, in a commercial country, almost all personal property must necessarily lie in contract; and considering also, that the assignment ought in justice to the assignee to be construed to be a covenant on the part of the assignor, that the assignee shall thenceforth possess the thing assigned to his own use, will protect the assignment of a chose in action, as much as the law will that of a chose in possession; though, in compliance with the ancient principle, the form of assigning a chose in action is still in the nature of a declaration of trust, and an agreement to permit the assignee to make use of the name of the assignor in order to recover the possession (1); and therefore, when in common accep-

¹ See Co. Lit. 232, b, n. (1). s. 347; Co. Lit. 214, a; 1

² *Ante*, part i. c. i. Rol. Abr. 376; Skin. 6, 26.

³ See 10 Co. 48, a; Lit.

(1) See observations of Mr. Justice Buller, on the assignment of choses in action, in *Master v. Miller*, 4 Durnf. & East, 320.

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tation a bond is said to be assigned over, it must still be sued in the name of the original creditor; the person to whom it is transferred, being rather an attorney than an assignee^m.

Now, therefore, it may be said, that any estate or interest in lands or tenements, whether certain or contingent, or present or reversionary; and all present and certain estates or interests in incorporeal hereditaments, as advowsons, rents, &c. though to commence *in futuro*; may be assignedⁿ.

And as in equity a bond is assignable for a valuable consideration paid^o, and the assignee alone becomes entitled to the money, if the obligor, after notice of the assignment pays the money to the obligee, he will be compelled to pay it over again^p. But the assignee must take it subject to the same equity that it was subject to in the hands of the obligee, as if on a treaty the intended husband enters into a marriage-brochage bond, which is afterwards assigned to creditors, yet it still remains liable to the same equity, and is not to be carried into execution against the obligor^q.

It was also formerly doubted whether an annuity was at law assignable, even though assigns were mentioned in the grant, the argument being, that it was a mere personal contract, and therefore a chose in action; and though this objection appears to have some weight, yet it has been overruled even at law^r. And as the principle of the objection is the same, whether assigns be mentioned or not, it should seem to be now equally assignable though they be not mentioned^s.

^m 2 Blac. Com. 39; 10 Co. 48, a; 3 P. Wms. 199; and see cases collected, 1 Fonb. Eq. 203; Co. Lit. 232, b. n.

ⁿ Perk. s. 91.

^o 3 Chan. Rep. 90.

^p 2 Vern. 540, 595; 1 Chan. Ca. 232.

^q 2 Vern. 428, 692, S. P. 764, S. P.

^r Hetl. 80; and see 7 Co. 28, b.

^s See Co. Lit. 8vo. 144, b. n. (1); but see Perk. s. 101.

The interest which a lessee has in his term before entry is also assignable over¹: but where a lessee has a covenant for a further term, in case the premises be in good repair at the end of the first term, it seems doubtful whether his interest in such conditional term can be made the subject of an assignment at law².

And, in general, a lessee may assign his term to another at pleasure, unless restrained by express covenant³, yet there is said to be this difference taken, that if the lessees or assignees have continued long in possession, and the premises are worsted, and become ruinous under their hands, or by their means, there the assignment to a beggar would be considered to be a fraud to get rid of the damage, which they ought to answer. But if they assign immediately after their coming into possession, there is no ground to relieve, because the assignee was not chargeable at law, and the lessor had his original security against the lessee and his executors unimpeached⁴. But where a man makes a lease, rendering rent, if the lessee assigns to a beggar or insolvent person, in equity the lessee shall be bound to pay the rent, which is a common case⁵. Whether equity will, in order to secure the future rents under any circumstances, restrain an assignee from assigning to a beggar or insolvent person, was considered, but not determined, in the case of *Philpot v. Hoare*⁶. If the lessee offer to give up the possession to the lessor on reasonable terms, and the lessor refuse to accept such surrender, it appears clearly too much for a court of equity, in restriction of a legal right, to prevent the assignment⁷. But supposing the lessor to be willing to accept of a surrender

¹ Co. Lit. 46, b.

² See *Skerne's case*, Moor, 296.

27.

³ *City of London v. Richmond*, 2 Vern. 421; Prec. Chan. 156; *Treacle v. Coke*, 1 Vern. 165.

⁴ Gilbert's *Lex Prætoria*,

296.

⁵ *Goddart v. Keate*, 1 Vern.

87, 88.

⁶ 2 Atk. 219.

⁷ *Vaillant v. Dodomede*, 2 Atk. 546.

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MENT.

of the term, and the lessee wantonly to insist on his legal right to assign, when and to whom he pleases, it should seem that, under certain circumstances, a court of conscience might without impropriety, interpose to prevent the abuse of such right^c.

And several things are assignable by acts of parliament, which seem not assignable in their own nature: as promissory notes by 3 & 4. Anne, c. 9; bail-bonds by the sheriff, by 4 & 5 Anne, c. 16; a judge's certificate for taking and prosecuting a felon to conviction, by 10 & 11 Will. 3. c. 23; a bankrupt's effects by the several statutes of bankruptcy^d.

But guardianship in soccage cannot, according to the better opinion, be assigned^e.

So neither can the pay of an officer in the army or navy, whether it be full or half pay, be assigned; it being contrary to the policy of the law, that a stipend given to one for future services, should be transferred to another who cannot perform them^f. A distinction was indeed formerly taken between full and half pay, the former being *pro servitio impendendo*, the latter *pro servitio impenso*^g. But no difference is now admitted between them; all emoluments of this sort being granted for the dignity of the state, and for the decent support of those who are engaged in the service of it. "It would therefore be highly impolitic to permit them to be assigned; for persons who are liable to be called out in the service of their country, ought not to be taken from a state of poverty: besides, an officer has no certain interest in his half-pay, for the king may at any time strike him off the list; however frequently, therefore, these said assignments have been made in fact,

^c See Fonb. Eq. b. i. c. v. s. vi.

^d See 1 Cook's Bank. L. 26, 282; 1 Fearn's Posth. Wks. 75, 83.

^e Gilb. Eq. Rep. 177.

^f *Barwick v. Read*, 1 Hen. Blac. Rep. 627, and note (b) there.

^g See *Stuart v. Tucker*, 3 Blac. Rep. 1137.

they cannot be supported in law^b." And the wages of seamen are forbidden to be assigned by statute¹.

ASSIGN-
MENT.

So neither can a personal trust which one man reposes in another, be assigned over, however capable the assignee may be to execute the trust^k.

III. THE CIRCUMSTANCES REQUISITE TO THE VALIDITY OF AN ASSIGNMENT.

THE first requisite, since the statute of frauds, to the validity of an assignment, is, that it be in writing¹; for by that statute it is enacted, that no leases, estates or interests, either of freehold or terms for years, or any uncertain interest in lands, shall be assigned, unless by deed or note in writing, signed by the party or his agent lawfully authorized by writing. But under this statute it has been holden, that an assignment may be made by a mere note or memorandum, without being either sealed or delivered^m, or even stampedⁿ. It would, however, it is submitted, (particularly with respect to the latter circumstance,) be extremely imprudent in an assignee to be satisfied with so loose a form.

Requisites of an
assignment.

The consideration requisite to support an assignment is, at law, the same as that required for the validity of other contracts and conveyances not operating by transmutation of possession^o.

And though the cases referred to in the preceding page incontrovertibly establish the principle that choses in action, and interests in contingency, are assignable, yet they seem also to shew, that in the case of assignment of personal interests, equity will, in general, require the assignee to prove that he gave a valuable consideration for the interest

^a *Flarty v. Oldham*, 3 Durnf. & East, 681; and see acc. *Kidderdale v. Duke of Montrose*, 4 lb. 248; but in this case it was hinted by the Court, that the assignee might bring an action against the assignor on his covenant.

¹ 1 Geo. 2, stat. 2, c. 14, s. 7.

^k 4 Inst. 85; Dyer, 1, b.

¹ See stat. 29 Car. 2, c. 3,

s. 3.

^m 4 Durnf. & East, 690.

ⁿ See 3 Burr, 2831.

^o See *ante*, p. 40.

ASSIGN-
MENT.

assigned, and will not, therefore, in general, assist volunteers. But yet, as against executors, administrators, or heirs at law, the courts have established them though not made for a valuable, but only for a good consideration, as natural love and affection, and the advancement of children².

But no consideration is in general necessary to support the assignment of a lease, by tenant for years, because the tenure, attendance, and forfeiture incident to the assignee's estate, are alone, and independently of the rent reserved, if any, sufficient to vest an use in the assignee¹; still, however, it appears to be proper to insert some valuable consideration, as well in order to support the assignment as a contract, should there be occasion to have recourse to that expedient, as to enable the assignee to maintain a possessory action, if necessary, which, as the assignment of itself transfers only the possession in law, he cannot do unless a valuable consideration be given¹.

Operative
words.

The operative or transferring words, commonly made use of in a deed of assignment, are "bargain, sell, assign, transfer, and set over," which are sometimes also preceded by "give and grant," for the purpose of enabling the assignee to plead the deed as a gift or grant, which, under particular circumstances, may happen to be a convenience¹ (1).

IV. OF THE EFFECT AND OPERATION OF AN ASSIGNMENT.

Operation of an
assignment.

THE effect of an assignment is a transfer of the right of possession from the assignor to the assignee, who, without entry, is thenceforth possessed, in law, of the thing as-

¹ *Beckley v. Newland*, 1 P. 100, 8 Durnf. & East's Rep. Wms. 182; *Hobson v. Trevor*, 595. 1 Mod. 263. 1 Ves. 409; *Wright v. Wright*, 1 Ves. 409; *Delany v. Stoddart*, 1 Durnf. & East's Rep. pl. 7. 26; and see *Innes v. Dunlop*, 8 Durnf. & East's Rep. 595. 1 Mod. 263. Ibid.; 2 Rol. Abr. 781, pl. 7. See 2 Blac. Com. 441.

(1) For the form of deeds of assignment, see 1 Bridgm. Conv. 89, 112; 2 Ibid. 28, 84, 134; Lil. 477, 507; Horsm. 129, 828; Bird's Assistant voc. ASSIGNMENT.

signed, he is not however entirely, or in fact so possessed, as the assignor has still the actual (though a mere naked) possession, and the assignee a right of possession only. Upon which principle, it is held, that the assignee of a lessee is by an assignment of his estate discharged from the covenants in the original lease, even though he still continue in possession¹: for as after assignment nothing remains in him beyond a mere naked possession, without any right, there is no privity between him and the lessor to support an action of covenant. And though it was long conceived that the assignee of an assignee had, before actual entry, such a possession as to support an action on the covenants in the lease², yet a contrary doctrine seems now to be pretty well established³.

CHAP. V.

OF A DEFEASANCE.

A DEFEASANCE, from the French word *defaire*, to undo, in its largest sense signifies a condition annexed to an estate, by non-performance of which the estate is made void; and sometimes the condition of an obligation annexed to it at the time of making; but it is more peculiarly and properly applied to such conditional instruments as are made in defeasance and avoidance of statutes and recognizances at the time of entering into them; and to such conditional instruments as are made in defeasance of statutes, obligations, and the like, after the time of their being entered into, and is defined by Sir William Blackstone, to be a collateral deed, made at the same time with a feoffment or other conveyance, containing certain conditions, upon the performance of which, the estate then

¹ See Dougl. 461.

Smith, Ibid. 275.

² See *Pilkington v. Shaller*, 2 Vern. 374; and *Sparks v. Dougl.* 455.

³ See 2 Danv. Ab. 484;

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ANCE**

Of what a defeasance may be made.

created, may be defeated or totally undone^a. A defeasance on bond, or recognizance, or judgment recovered, is also a condition, which, when performed, defeats or undoes it: and differs only from the common condition of a bond, in that the one is always inserted in the deed or bond itself the other is made between the same parties by a separate, and frequently a subsequent deed^b.

By the common law, no secret defeasance or revocation was allowed of a solemn conveyance, perfected by livery of seisin, unless executed at the same time. But all inheritances executory, as rents, annuities, conditions, warranties, and the like, might at all times be annulled and discharged by a defeasance, made with the mutual consent of all those who were parties to the creation of them at the time, or at any time afterwards. And so of statutes recognizances, obligations, and the like; for it is a rule, that in all cases, where any executory thing is created by a deed, the same thing, by the consent of all persons who were parties to the creation of it, may be defeated and annulled; and therefore that warranties, recognizances, rent-charges, annuities, covenants, leases for years, uses at common law, and the like, may, by a defeasance made with the mutual consent of all those that were parties to the creation of it, by deed, be discharged and avoided; *nil est tam conveniens naturali equitati quam quod unumquodque dissolvi potest eo ligamine quo ligatur*; and therefore, by such a defeasance, not only the covenant which creates a power of revocation, but the power itself, may be utterly defeated and avoided; but estates of inheritance, and other estates in tail or for life, executed by livery, &c. cannot be avoided by defeasance made after the time of their creation. But by another deed of defeasance, made at the same time, a feoffment, release, lease for life, or other executed thing, may be avoided, as well as if it were by condition within the same deed: thus, if a dis-

^a 2 Blac. Com. 337.

^b Ibid. 342; and see Shep. Touch. c. 22, p. 396.

seisee release to the disseisor, though this release cannot be defeated by an indenture of defeasance made afterwards, yet it may be defeated by an indenture of defeasance made at the same time, *Quæ in continenti fiunt in esse videntur*.*

And in this manner mortgages were in former times usually made, the mortgagor enfeoffing the mortgagee, and he at the same time executing a deed of defeasance, whereby the feoffment was rendered void on re-payment of the money borrowed on a certain day; and this, when executed at the same time with the original feoffment, was by the ancient law considered as part of it[†]; for which reason only was it indulged: no subsequent secret revocation of a solemn conveyance, executed by livery of seisin, being allowed in those days of simplicity and truth; though, when uses were afterwards introduced, a revocation of such uses was permitted by the courts of equity. But, as has been just intimated, things that were merely executory, or to be completed by matter subsequent, (as rents, of which no seisin could be had till the time of payment; and so also annuities, conditions, warranties, and the like), were always liable to be recalled by defeasances made subsequent to the time of the creation*.

But, to make a good defeasance, it is principally requisite: 1. That the defeasance be made *eadem modo* as that by which the thing to be defeated was created, that is to say, if the one were by deed, the other must be by deed also: for if an obligee by word only discharge the obligor, or grant not to sue him, this will not defeat the obligation; it must be by deed, therefore, as the former was[†]. But whether the deed or defeasance be indented or poll is not material[‡]. 2. That if it recite the statute or the obligation, it be done truly: for if a defeasance be made of a statute, or an obligation, which is recited to be made the tenth day

* Co. Lit. 236, 237; 1 Co. 111, 113; Plow. 137, 193.

† Co. Lit. 236.

‡ Ib. 237; 2 Bl. Com. 327.

† 1 Co. 113.

‡ Bro. Defeas. 12; Fitz. Barre, 95.

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ANCE.**

of May, which in truth bears date the first day of May, this defeasance is void^a. 3. That it be made between the same persons that were parties to the first deed, &c.: and therefore if *A.* be bound in an obligation to *B.* in 20*l.* and *B.* make a defeasance to *C.* that if *C.* pays him 20*l.* the obligation made by *A.* shall be void; this is no good defeasance, because it is not made between the same parties¹. And yet if a statute be made to the husband and wife, and the husband alone join in the making of a defeasance, this is a good defeasance². 4. That it be made after the making of the recognizance, obligation, &c. and not before¹; but though the date of the defeasance be before the date of the recognizance, &c. yet if it be delivered afterwards, it is good enough^m. 5. That it be made of a thing defeasible: for if a disseisee release his right to the terre-tenant, and after there is a defeasance made between them, that if the releasor shall pay 20*l.* to the releasee, the release shall be void, this is a void defeasanceⁿ; although a release may be avoided by a condition or defeasance made at the time of making of a release as well as a feoffment^o.

Separate deeds of defeasance are now, however, in but little use, as it is more common, and in most cases preferable, to insert the conditions, or terms of defeasance, in the instrument itself, by which the agreement, or other obligation, is created; as by this means they become incapable of separation, and the conditional or defeasible deed cannot be fraudulently set up as an absolute or indefeasible one (1).

^a Plow. 393.^m Dyer, 315.¹ 14 Hen. 8, 10; Bro. Estr. L. Fait. 10.ⁿ Plow. 137; Bro. Defeasance, 1.² Bro. Defeasance, 3.^o Bro. Defeasance, 6, 9;¹ Ibid. 5.

Co. Lit. 236.

(1) See the form of a deed of defeasance, 1 Bridgm. Conv. 52, 313; Horam. 327, 332; Wilde's Sup. vol. i. No. lxxxii. p. 530.

BOOK III.

PART III.

OF CONVEYANCES DERIVING THEIR OPERATION FROM THE STATUTE OF USES.

CHAP. I.

OF A COVENANT TO STAND SEISED TO USES.

HAVING finished the consideration of deeds operating by the rules of the common law, we now proceed to those which derive their effects from the statute of uses.

COVENANT
TO STAND
SEISED.

We have seen, that by the old common law, all conveyances of real property, required the ceremony of livery of seisin, or of attornment, to perfect them; but when, through the medium of *uses*, the jurisprudence of equity was let in upon the dispositions of real property, the Court of Chancery, regarding the nature upon which contracts for the alienation of property are grounded, gave an *equitable* effect to two species of grants, (or contracts considered as equivalent thereto), which, without the ceremonies of livery of seisin, or attornment, had no operation at all in *law*. The considerations, which gave rise to this benign construction, were those which are commonly distinguished by the respective epithets of *good*, and of *valuable*; the former being the consideration of blood, or

**COVENANT
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SEISED.**

of marriage; the latter of a pecuniary price: both which considerations, from their interesting and obligatory natures, were considered by the Court of Chancery as raising an use in the subject of the contract, or intended grant, for the benefit of the person in whom such considerations existed, or from whom it moved; and though the legal estate in the subject of such contracts, or intended grants, was not thereby altered or transferred for want of the ceremonies before-mentioned; yet the grantor, or contractor, was, upon the ground of such considerations, considered in equity as standing seised, or legally entitled to the things which were the subjects of such grants, in trust for the covenantee or intended grantee^a; and the party intended to be benefited, having thus acquired the use, was put at once into corporeal possession of the land, by the statute of uses, operating upon his estate^b.

Contracts of the former of these kinds, that is, where blood or marriage is the consideration, were denominated **COVENANTS TO STAND SEISED TO USES**, because they amounted either to an express covenant, or an implied engagement to stand seised for the benefit, that is, for the use and advantage of the grantee, or covenantee: And those of the latter kind, namely, where a pecuniary consideration was the motive, were called *Bargains and Sales*.

Of these two species of assurances we are now to treat; and first, of a **COVENANT TO STAND SEISED**.

A covenant to stand seised may be defined to be an instrument in writing, by which a man, seised of lands, covenants, in consideration of blood or marriage, that he will stand seised of the same to the use of his child, wife, or kinsman^c; after which covenant he becomes seised to the use of such child, &c. and therefore comes within the statute of uses; and being seised to the use of another, the

^a See Plow. 301, b; 303, a; ^c 2 Blac. Com. 337; Plow. Fearn's Posth. Works, 16. 301, 303.

^b Bac. Uses, 151; 2 Blac. Com. 337.

statute transfers the possession and legal estate; and hence it is, like a bargain and sale, made a mean of transferring the estate to the covenantee.

**COVENANT
TO STAND
SEISED.**

This mode of conveyance being confined to those particular ends, and not calculated for general purposes, is now seldom had recourse to as a conveyance of land; but as the doctrines relating to it are not unfrequently applicable to the construction of marriage articles and family settlements, it will be proper to give it a short consideration.

In doing which, I shall notice: 1. Of what there may be a covenant to stand seised: 2. The consideration necessary to support it: 3. Of the form of a covenant to stand seised: 4. Of the operation and construction of such a covenant.

1. With respect to the things of which a man may covenant to stand seised, it is to be observed, that as such covenant must always be intended to be to the use of another, it follows, that it can operate upon such hereditaments only as are capable of being conveyed by way of use: these have been enumerated in a former chapter^d.

Of what there
may be cove-
nant to stand
seised.

It is further requisite, to a covenant to stand seised; that the lands should be in the possession or seisin of the covenantor, for it will operate on such lands only of which the covenantor is actually seised or entitled at the time, either in possession or remainder, for it is out of the seisin of the covenantor that the use arises^e. Hence, if a father covenant to stand seised of all the lands which he then has, or which he shall afterwards purchase to the use of his son, &c. no after-purchased lands will pass, or be affected by the covenant, but only those of which he was seised at the time of the covenant^f. So also, if one of two joint-tenants covenant to stand seised to uses of the moiety of his companion; in case he should survive him; no use will arise

^d See of these, *ante*, vol. iii.
c. 10. B. 3: p. 524.

^e *Yelverton v. Yelverton*,
Cro. Eliz. 401; 2 Rol. Abr.
790.

^f *Wiseman's case*. 2 Co. 15, a.

**COVENANT
TO STAND
SEISED.**

Consideration
to support
covenant to
stand seised.

Consideration
of blood.

although he should survive ; because, at the time, he had no title to the moiety of his co-tenant^s.

2. Of the consideration necessary to support a covenant to stand seised.

The only good consideration of a covenant to stand seised is that of blood or of marriage¹, for this being a secret conveyance, it requires a meritorious consideration to support it. Consideration of blood is, in other words, a consideration or motive arising from the natural affection which a man is presumed to have for his near a-kin, and the wish and moral duty he has to benefit or provide for them. Hence therefore, if a man, in consideration of the natural love and affection he has for his son, covenants to stand seised to his use, this will be a good consideration; and the statute will execute the use and transfer the possession to such son ; and this consideration of affection for a son, will extend to the wife of such son, for whom therefore a covenant with the son to stand seised, will be good¹. And a consideration of natural affection expressed to one child will, by construction of law, be extended to other children. If therefore a man, having issue three sons, covenants in consideration of natural affection to the eldest son, to stand seised of certain land to the use of himself for life, and afterwards to his eldest son, and the heirs male of his body ; and for default of such issue, to the use of his second son, and the heirs male of his body ; and for default of such issue, to the use of the third son, &c. this is a good consideration to raise the use to his younger sons ; for though the consideration of natural affection be limited only to the eldest, yet as this is equal in respect to all the sons, the law will supply it without expression ; indeed, if nothing had been expressed, it

^s *Barton's case*, 2 Rol. Abr. 790.

¹ *Gilb. Law of Uses*, 47 ; *Garnish v. Wentworth*, Cart.

139.

¹ *Sharlington v. Strotton*, Plow. 300 ; *Bould v. Winston*, 2 Rol. Ab. 786 ; *Bedell's case*, 7 Co. 40.

would have been a good consideration by implication of law^k.

The consideration of natural affection is likewise good to raise an use to children unborn. Thus, the consideration of affection to the heirs male of the covenantor which he may beget on the body of A. his wife, is a good consideration to raise an use to such heirs of his body when born^l. So, if a man covenant to stand seised to the use of himself and the heirs male of his body, this shall raise a good estate-tail; for though all the estate-tail is in himself, yet this is for the benefit of the heir male when he comes into esse. And a man may modify a fee that continues in him, although he cannot take *de novo* a fee which is already in him^m.

But affection for a bastard is not such consideration as will raise an use; for in law he is not supposed to be of the blood of his father, but is considered as a mere stranger, for whom no one is presumed to have a natural affectionⁿ. So likewise, if a man covenants, in consideration of blood and also of the marriage of his bastard daughter, to stand seised to the use of such daughter, this is not a good consideration to raise an use, for in law she is not considered his daughter, but *filia populi*^o (1).

^k 2 Rol. Abr. 782, 783, between Bond and Edmonds, *per curiam*. ⁿ Perrot's case, 2 Rol. Abr. 785; Worsley's case, Dyer, 375, pl. 16; Gilb. Law of

^l *Sharington & al. v. Strotton*, Plow. Rep. 300.

Uses, 48, 206.

^m Gilb. Law of Uses, 209.

^o 2 Rol. Abr. 785, between Frampton and Gerard.

(1) But, if a man covenants, in consideration of natural love and affection, and the marriage of his bastard daughter, to levy a fine, and that the conusee shall stand seised to the use of the bastard daughter, though this be not a sufficient consideration to raise an use upon a covenant, yet as it is expressive of the intent of the party, it therefore shall serve as a sufficient declaration of an use upon the fine, which needs no consideration. Gilb. Law of Uses, 207. And see Co. Lit. 123, a, n. (8).

**COVENANT
TO STAND
SEISED.**

Love for a brother is a good consideration to raise an use by way of covenant; for this is a consideration of blood, and the brother is one of the next degrees after his parents and children; and they who are next in blood, are, by intendment of the law, next in love^p. Thus, where A. covenanted with his brother, in consideration of the love and affection which he bore towards his wife and children, and to the intent to settle his land in his name and blood, to stand seised to the use of himself for life, and after to his wife for life, and to raise portions for his children, the use was held to arise for all of them, they being within the consideration^q.

But considerations of ancient acquaintance, or of friendship, shall not raise any use^r; for it will not be presumed, that a person can have intended to dispose of his lands from his own family, where any ceremony necessary by law to give effect to a contract is wanting^s. Neither will the consideration of the covenantee's changing his surname to that of the covenantor^t. And it is to be observed, that though the natural affection is the essential cause of the raising of the use, yet if the nearness of kin between the covenantor and covenantee be such as to presume an affection, it seems to be enough, without such affection being expressed in the deed^u.

**Consideration
of marriage.**

The consideration of marriage, may be either before or after. A man may covenant to stand seised to the use of A, his wife, and the consideration that she is his wife will raise a good estate to her, for this is a good consideration in law.

^p Rol. Abr. 785, cites Plow. Com. 300, *Sharrington v. Strotton*; *Wiseman's case*, 2 Rep. 15, a.

^q 2 Rol. Abr. 783; S. C. Cro. Car. 529, by the name of *Smith v. Risley & al.*; S. C. Sir William Jones, 418, by the name of *German v. Risley*; *Paget's case*, 1 Rep.

154, a; *Whaley v. Tancard*, 2 Lev. 52, 54.

^r 2 Rol. Abr. 783; *Gilb. Uses*, 48; *Plow. 503*.

^s *Gilb. Uses*, 48.

^t *Jenk. 81*, pl. 60.

^u *Bedell's Ca. 7 Co. 40, a*; 2 Rol. Abr. 790; 2 *Wils. 22*; *Goodtitle v. Petto*, 2 *Sera. 934*; *sed vide Gilb. Us. 125*.

So, also, the consideration of a marriage to be had, will raise an use^v.

COVENANT
TO STAND
SEISED.

A man may likewise covenant to stand seised to the use of A. the wife of his brother, in consideration that she is the wife of his brother, and this shall raise a good estate to her; for the love which he bears towards his brother extends in his right to his wife^z.

Consideration
of marriage.

And if a man covenants, in consideration of natural love and affection to his son, to stand seised to the use of his son for life, the remainder to such wife as the son shall afterwards have for life, the remainder to the first son of the son on the wife begotten, &c. though the wife be a stranger to the consideration, yet the estate limited to her is well raised for the subsequent estate, because the covenantor intended the advancement of his posterity; and without a wife the son cannot have a lawful posterity^y.

But if a man covenant to stand seised to the use of himself for life, with remainder to the use of trustees (not being of the blood of the covenantor) to preserve contingent remainders, with remainder to his first and other sons in tail, &c. no use will vest in those trustees, because, as no other consideration than that of natural love and affection, arising from relationship, is deemed a sufficient consideration to raise an use by this deed, it of course cannot vest in trustees, who are *strangers*.

Again, if a man covenant to stand seised to the use of himself for life, with power to make leases, this power cannot be exercised as the limitation of an use, but will be void^z; for as no use will arise without a good consideration, it cannot arise to the lessees, for where the persons are altogether uncertain, and the terms unknown, there can be no consideration; but the consideration of love, &c.

^y Sid. 89, in case of *tween Bould and Winston*; *Stephens v. Brittridge*. Noy, 122, S. C.

^z *Sharrington v. Strotton*, *Mildmay's case*, 1 Co. Plow. Rep. 306. 176, b; 2 Rol. Abr. 260, a, b;

^y 2 Rol. Abr. 766, be. Cro. Jac. 181.

**COVENANT
TO STAND
SEISED.**

in a bargain and sale may be averred, and will support it, although not expressed in the deed^a.

By the statute of uses, s. 4 & 5, a rent may be reserved or made payable on a covenant to stand seised^b.

3. Of the form of a covenant to stand seised.

The words "covenant to stand seised" to the use, &c. are the most proper and technical words of this conveyance; but as the consideration is the foundation of it, these words are not essential to its operation^c.

Where, therefore, a man, in consideration of natural love, and for augmentation of his daughter's portion, "gave, granted, bargained and sold, aliened and enfeoffed," lands to his daughter, this was held to enure as a covenant to stand seised, because of the consideration^d.

And where there is a feoffment by deed to a relation and his heirs, though nothing can pass by the feoffment for want of livery of seisin; yet as there is an agreement by deed, and the parties are relations, the law holds it a consideration for raising an use, and construes it a covenant to stand seised to the use of the person specified in fee; and the estate passes, not by feoffment, as the deed imports, but by virtue of the statute of uses; for *ut res magis valeat*, &c. the feoffment shall operate as a covenant to stand seised^e.

So where, in a settlement, it was declared, that if the settlor had no issue, then he "gave, granted, and confirmed," to the use of his kinswoman, and the heirs of her body, an use was held to be well raised^f.

Hence a conveyance, which is void as a release, may in some cases be good as operating by way of covenant to

^a *Bedell's case*, 7 Co. 40, a; 175; *Walker v. Hall*, 2 Lev. 213; *Osman v. Sheafe*, 3

^b *Rivett v. Godson*, W. Lev. 370; *Doe v. Simpson*, Jones, 179. 2 Wils. 22, 75; 1 Atk. 188.

^c 1 Vent. 137; 2 Ib. 150; ^e *Per Wilson, J.* 2 Ves. jun. 226.

^d 1 Vent. 138, *et seq*; *Crossing v. Scudamore*, 1 Mod. 237. ^f *Harrison v. Austin*, 3

stand seised; as where *K.* by lease and release, in consideration of the natural affection he had for his brother, "granted, released, and confirmed" to his said brother, certain lands, &c. to hold to him and his heirs, after the decease of himself the said *K.* Though this was void as a release, as being the grant of a freehold to commence *in futuro*, yet the court were unanimously of opinion that it would operate as a covenant to stand seised^s (1).

4. Of the operation and construction of a covenant to stand seised.

In a covenant to stand seised, the estate necessarily continues in the covenantor until the use which is to be executed by the statute arises^b. If, therefore, a man covenant to stand seised to the use of *A.* for life, remainder to the use of *B.* for life, remainder to the use of *C.* in fee, and *A.* refuses, *B.* shall not take his estate presently, as he would in the case of the like limitations by feoffment, where all the estate passes out of the feoffor, and all the uses are created out of it as out of one and the same root, but the land shall remain in the covenantor till the next use arises; for in the case of a covenant to stand seised, the consideration, which is the cause that raises the several uses, is also several, and all the uses grow and rise out of the estate of the covenantor¹.

So, if a man covenant to stand seised of the manor of *D.* which he shall thereafter purchase, to the use of *J. S.* and he afterwards purchase the manor, yet this is void^k. So, if a man covenant to stand seised of the land that he shall afterwards purchase to the use of his son, and then purchases land to the use of himself and his heirs, the fee

^s *Roe v. Farmer*, 2 Wils.
75.

^b 1 Co. 1

¹ *Per Manw. Ch. B.* 1
Rep. 154, a.

^k 2 Rol. Abr. 790, pl. 8;
Moor, 342; Cro. Eliz. 401.

(1) See the form of deeds of covenant to stand seised, 2 Bridgm. Conv. 102, 139, 140; Wilde's Sup. vol. i. No. lxx. p. 459.

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SEISED.**

is in the father¹. For when a man exercises an ownership over any lands, you must suppose him to have a power to bind them; but he that has no interest, has no power to bind them; and therefore such a covenant in equity, before the statute, could not oblige him to a specific performance, for that were in equity to bind the land, which is absurd; and since the covenant is void in equity, there can be no execution by the statute; for the rules of law are equally strict in avoiding this repugnancy; as in law, every disposal supposes a precedent property; and, consequently, every covenant to stand seised pre-supposes a precedent seisin². And another reason why the use declared upon the covenant is bad, is this; because the use must be limited by the donor or feoffor; for he must limit the use, who at the time of the limitation had the disposal: now in this case the donor limits the fee to the purchaser, which controls the intent of the covenant³.

By the same rule it is said, that if a mortgagor, in consideration of so much money paid by J. S., covenants that, after redemption, he will stand seised to the use of J. S. and his heirs, this is a void covenant, for at the time of the contract he had no estate or interest⁴.

A covenant to stand seised is a rightful or harmless conveyance, and passes no interest but that of which the covenantor may lawfully convey; nor divests any estate, nor works any discontinuance; for as nothing but the use passes, and as no use can possibly be greater than the estate out of which it arises, it follows, that where a greater use is expressed to be given than the estate of the covenantor out of which it arises, such greater use is merely void, and the statute executes the possession to so much only of the use as is lawfully granted⁵.

¹ *Yelverton v. Yelverton*, Cro. Eliz. 401; Noy, 19, S.C.
² *Gilb. Law of Uses*, 116.
³ *Cro. Eliz.* 401; Noy, 19.
⁴ *Yelverton v. Yelverton*, Cro. Eliz. 401; Noy, 19, S.C.
⁵ *Gilb. Uses*, 140, 207; *Cru. Uses*, 96; *Fearne*, 246; *Seymour's case*, 10 Co., 95; 1 Atk. 2.

CHAP. II.

OF A BARGAIN AND SALE.

IN treating of a *Deed of Bargain and Sale*, which, if considered in its full extent, and as constituting one of the assurances which give effect to the conveyance by LEASE AND RELEASE is very comprehensive and important^a, I shall endeavour to explain,

BARGAIN
AND SALE.

- I. THE NATURE AND ORIGIN OF THIS SPECIES OF ASSURANCE.
- II. WHO MAY MAKE A BARGAIN AND SALE.
- III. WHAT MAY BE THE SUBJECT OF A BARGAIN AND SALE.
- IV. THE REQUISITES TO CONSTITUTE A BARGAIN AND SALE.
- V. THE EFFECT AND OPERATION OF A BARGAIN AND SALE.

I. OF THE NATURE AND ORIGIN OF A BARGAIN AND SALE.

A BARGAIN and sale is a kind of real contract, founded upon some pecuniary or other valuable consideration, for the passing of an estate of inheritance or freehold in possession^b, reversion or remainder^c, in manors, lands, tenements or hereditaments, by deed indented and enrolled, which is effected by means of the statute of uses in the manner hereafter noticed.

This mode of conveying lands was created and established by the 27 Henry 8, cap. 10, usually styled the

^a Fearn's Posth. Works, 33.

^b 2 Inst. 672.

^c Vaugh. 51; 8 Co. 93, 94.

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statute of uses^d, by which statute it is enacted, that where any person or persons is or are seised of any manors, lands, tenements, &c. to the use, confidence or trust of any other person or persons, or body politic, by reason of any bargain, sale, feoffment, &c. such person or persons having any such use, &c. shall be deemed and adjudged in lawful seisin, estate and possession thereof, to all intents and purposes, of or in such like estates as they have in the use, confidence or trust; and the estate, right and possession of him and them so seised to any use, &c. shall be deemed and adjudged in him or them who have such use, &c. after such quality, manner and form, as they had before in or to the use, confidence or trust. The bargainer, therefore, by contracting for a pecuniary consideration to convey to the bargainee, becomes a trustee for, or seised to the use of the bargainee; and then the statute completes the purchase^e; or, as it has been well expressed^f, the bargain or contract first vests the use, and then the statute vests the possession^g. And this possession, or rather legal estate thus transferred by the operation of the statute of uses, is equivalent, in most respects, to a possession or legal interest acquired by an actual entry under a conveyance by the common law. Thus, if a bargain and sale be made for years, of land, &c. in the possession of the bargainer, such bargainee for years is capable of receiving the reversion expectant upon the expiration of such term, without any actual entry upon the land^h (1). And upon this doctrine is founded the operation of the release made immediately subsequent to the bargain and sale for a year,

^d Co. Lit. 273; 2 Inst. 672; Keilw. 85; 1 Co. 87.

^e 2 Blac. Com. 337.

^f Bac. Uses, 150.

^h *Lutwich v. Mitton*, Cro. Jac. 604.

^g Cro. Jac. 696.

(1) But it seems not agreed, whether he can maintain an action of trespass, without a previous actual entry. See 1 Vent. 361; Cro. Jac. 664.

in the common conveyance, known by the name of a
LEASE and RELEASE.

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II. WHO MAY MAKE A BARGAIN AND SALE.

It has been seen, that a bargain and sale operates as the transfer of an use ; it follows, that none but those who are capable of standing seised to an use can convey by bargain and sale¹, and also that the bargainer must have the use to be transferred.

Therefore, neither the king, nor any other person who is incapable of being seised to an use, can make a bargain and sale ; for at common law, when a man had sold his land for money, without giving livery, the use passed only in equity, and this is now executed, and becomes a bargain and sale by the statute ; antecedently, however, to any such execution, there must be an use well raised, which cannot be without a person is capable of being seised to an use, which the king is not, as there is no means to compel him to perform the use or trust, the Court of Chancery having a delegated power from the king over the consciences of his subjects only ; and the king, who is the universal judge of property, ought to be perfectly indifferent, and not to take upon him the particular defence of any man's estate as a trustee^k.

And so also of a corporation ; though, therefore, it is said that money given by the governors of an hospital, will raise an use to them in their public capacity¹ ; and that " though a body politic cannot be seised to an use, yet upon a bargain and sale to them a trust may be limited that they shall dispose of the rents and profits amongst the poor of the corporation ;" and " that a corporation, though it cannot stand seised to an use, may charge its

¹ Gilb. Uses, 285 ; *Atkins* 681 ; and see Gilb. Uses, 82. v. *Longvill*, Cro. Jac. 50.

^k See Bro. " Feoffment ;" Gilb. Uses, 285 ; 2 Rol. Abr. 788.

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own possessions with an use^m;" yet these doctrines do not appear ever to have been acted upon in practice (1); and in *Chudleigh's* caseⁿ, the notion of charging the land with an use is treated as an absurdity; for an use being a confidence and trust, it would be an absurdity to say that it was annexed to or charged upon the land, like a rent or common; and, if adopted, it would have the effect of enabling an alien, the king, a corporation, the lord by escheat, &c. to stand seised to uses.

Tenant in tail may bargain and sell his land in fee; but this passes only a descendible estate of freehold, determinable upon the life of tenant in tail; for at common law the use could not be granted of any greater estate than the party had in him; now tenant in tail has an inheritance in him, though he can dispose of it only during his own life; and therefore when he sells the use in fee, *certain* use has a kind of inheritance yet determining within the compass of a life; and the statute executes it in the same manner as he has the use, and consequently he will have some properties of a tenant in fee, and some of a tenant for life only. But if tenant for life bargain and sell in fee, this passes only an estate for life^o. For he could not pass more than the use of an estate for life to the bargainee, and the statute executes the possession as the party has the use^p.

^m *Holland v. Boins*, 2 2 Inst. 674; Mod. 43; 1 Leon. 121; 3 Ibid. 175. Co. 98; 10 Co. 6.

ⁿ 1 Co. 127, a.

^p 1 Co. 14, 15; 10 Co.

^o Car. 208; 4 Leon. 124; 98, 98.

(1) The mode of making a corporation convey is either by feoffment with livery, or by release, grounded upon a lease at common law, for a year, followed by the actual entry of the lessee.

III. WHAT MAY BE THE SUBJECT OF A BARGAIN AND SALE.

GENERALLY speaking, all corporeal hereditaments, of which the bargainor has seisin, actual or potential, and all incorporeal hereditaments in actual existence, of which he is possessed at the time of executing the bargain and sale, may be made the subject of this conveyance, because all such things are liable to an use.

Any freehold or inheritance, whether in possession, or in reversion, or remainder expectant upon the determination of an estate for years, or life, or in tail, of which the bargainor may be seised, may therefore be bargained and sold¹(1). As may also, it should seem, whatever else is capable of being limited to an use; as the trust of a legal estate, or an equity of redemption². For per Thurlow, Chancellor³, an equitable estate is, in many cases, considered as if it were a legal estate, and the word *seised* in law or *equity* is used in the qualification act and other acts which shows that the word seisin is applicable to both; and hence trust estates are now frequently conveyed by bargain and sale.

And so an advowson, being limitable to an use, may be conveyed by bargain and sale⁴, as may also a *rent in reversion*(5), these being freehold, within the statute⁶; and, before the statute of uses, a rent, although *newly* created, might be

¹ 2 Co. 54; Dyer, 309; applicable to a trust estate.
² Inst. 671; 2 Saund. Uses
and Trusts, 36. ³ *Shrapnell v. Vernon*, 2
Bro. Rep. 271.

⁴ *Colden v. Samborn*, 2
Atk. 15; and see *Shrapnell*
v. Vernon, 2 Bro. Cha. Ca.
268, 272, where it is said
that the word "seisin" is
⁵ *Co. Lit. 332. a; Lit.*
a. 617.
⁶ *Taylor v. Vale*, Cro.
Eliz. 166.

(1) See Reame's Posth. Works, 26, n. *; and Watk.
Princ. 68, n. *.

(2) *Quere*, Whether tythes may be bargained and sold?

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AND SALE.

bargained and sold, because when money was given as an equivalent, chancery supplied the want of ceremonies or words of law; but it seems, that since the statute, a rent newly created cannot be bargained and sold, because there ought to be a freehold in some other person, to be executed in the *cestui que use*, but there can be no seisin of this rent in the bargainor, because no man can be seised of a rent in his own land, and consequently there can be no estate to be executed in the bargainee^a; and so of other incorporeal hereditaments, as tythes, commons, &c. which may be conveyed by this assurance; but they must all be *in esse* at the time, for there can be no use of a thing not in being^r.

But no estate for years, or other chattel interest, can be conveyed by bargain and sale, because of such property there can be no seisin, but only a possession^s. Where, however, a person is seised of the freehold, he may make a bargain and sale thereof for years, for having the seisin he may raise an use thereout for years, as well as for a greater estate, and the possession is as completely transferred by the statute to the *cestui que use* for years, as to the *cestui que use* of a freehold^a (1).

An use cannot be made the subject of a bargain and sale, for as an use cannot be limited out of an use, it follows, from the definition before given of a bargain and sale, that an use cannot be limited upon the legal estate of the bargainee, so as to be executed by the statute^b, because the pecuniary consideration paid by the bargainee, appro-

^a Keilw. 85; 1 Co. 126; ^s Fox's case, 8 Co. 93; 1 And. 327; 1 Jones, 179; 2 Inst. 672; *sed vide* Ib. 671; *sed vide* 2 Co. 74; Pop. 49. 2 Rol. Abr. 204.

^r *Beaudely v. Brook*, Cro. Jac. 189. ^b *Tyrrel's case*, 1 And. 37; 1 Leon. 148; Dyer, 155, a;

^s 2 Co. 35, 36; Pop. 76; T. Jones, 217; Gilb. Uses, 286. Pop. 81.

(1) *Quere*, as entry by lessee is requisite under a lease at common law, would not a bargain and sale be a proper instrument for creating a lease for years?

priates the use solely for his benefit, for as the use arising in the bargainee, is solely in consequence of the consideration, it is plain that no use can arise further than such consideration extends (1).

And if *A*, by indenture enrolled, bargain and sell lands to *B*. and his heirs, with a way over other of the lands of *A*. this is void as to the way; for nothing but an use passes by the deed, and there can be no use of a way or other incorporeal thing, before it is created^c.

IV. OF THE REQUISITES TO A DEED OF BARGAIN AND SALE.

THE chief requisites to the validity of a bargain and sale, are, 1. That it be by writing indented; 2. That it be founded on a valuable consideration; and 3. If it be of an estate of freehold, that it be enrolled in a court of record. At common law, lands might be bargained and sold

Bargain and
sale must be
by indenture.

^c *Beaudely v. Brook*, Cro. Jac. 189.

(1) And hence, when a settlement is made by this species of instrument, of lands to a husband and wife, with a power for him to make leases, a lease made under such a power cannot operate as an appointment of the use to the lessee, for an appointment, as will be shown hereafter, derives its effects from the deed from which it originates, and there is no *scintilla juris* or possibility of seisin remaining in the bargainor, after the bargain and sale, to serve an use limited upon a future event. See Saund. Uses, 60; Poph. 81; 2 Rol. Abr. 260; Cro. Jac. 181; *Holloway v. Pollard*, Moor, 761; see also 4 Cru. Dig. 322. It should seem, however, that a covenant contained in a bargain and sale on the part of the bargainee, will raise an use out of his legal estate, upon a future event; see Moor, 35, pl. 115; though in this case the covenant and the deed must be considered as two conveyances, 2 Rol. Abr. 786, (M), and founded upon two distinct considerations; whence it has been doubted, whether there should not be two enrolments. 2 Saund. Uses, 62. And hence a bargain and sale will not be effectual to convey lands, &c. to a purchaser to uses to prevent dower.

BARGAIN
AND SALE.

What words
necessary.

by parol only, for it was the consideration which in equity raised the use (1): but since the statute of 27 Henry 8, c. 16, a bargain and sale must not only be in writing, but also by indenture, under the seal of the bargainor^a.

The most proper and usual words employed in transferring lands by deed of bargain and sale, are those of bargain and sell; but it is not actually necessary to use the words "bargain and sell," as any words of an equivalent import will be equally efficacious; indeed, whatever words upon valuable consideration would have raised an use at common law, will amount to a bargain and sale within the act; if, therefore, a man by deed indented, covenant, for a valuable consideration, to "stand seised" to the use of another, &c.^f or "give and enfeof^g," or "alien, grant or demise^h," it will operate as a bargain and sale. And though it should appear from any clause in the deed to have been the intention of the parties that it should enure as a common law conveyance, yet this, it is said, will make no differenceⁱ.

Therefore, where a man, in consideration of money, demised, bargained and sold a manor, &c. for a term of years, it was held that the party might choose either to take it by way of lease at common law, or by way of bargain and sale; for the policy of the common law is to construe men's grants so as to pass such interest as shall be most advantageous for the grantee; and since, in this case, the words allow a double way of taking it, the

^a 2 Inst. 675; Dyer, 229; Poph. 48; 3 Leon. 16, 17.

^b Anon. 3 Leon. 16.

^c 8 Co. 94, a; Cro. Eliz.

^d 2 Inst. 672; Cro. Jac. 166.

210; Cro. Eliz. 166; 7 Co.

40; Far's case, 8 Co. 94;

ⁱ Vent. 138; Moor, 34;

^e 3 Leon. 16, c. 39; *sed quare, et vide* 8 Co. 94, *contra*.

(1) And therefore lands in cities and boroughs might, till 29 Car. 2, c. 3; (notwithstanding the stat. 27 Henry 8.) be bargained and sold by word only. 2 Inst. 675; Yet. 124.

grantee shall judge which will be most beneficial^b. And if he had demised and granted only, without the words "bargain and sell," it would have been the same^c.

As, however, it has been said, that when a conveyance may take effect, either at the common law, or under the statute of uses, it shall operate at the common law, unless the intention of the parties appear to the contrary; it seems proper, when it is intended that the deed should operate as a bargain and sale, that the words "bargain and sell"^m only should be made use of, as by this means all uncertainty, with respect to its operation, will be avoidedⁿ.

In creating a fee by bargain and sale, it is necessary to mention the *heirs* of the bargainee; for though before the statute of Henry 8, if a man had bargained his land for a competent sum of money, without the words "his heirs," the Chancellor would have obliged him, according to conscience, and the intent of the parties, to execute an estate in fee, uses then being things merely in trust and confidence; yet, since the statute, they are transferred and made into an estate in the land; and therefore, without the word "heirs," the bargainee hath only an estate for life^a.

2. Of the considerations necessary to support a bargain and sale.

Consideration
of bargain and
sale.

As an use cannot be raised without a consideration, and a bargain and sale is the conveyance of an use, it follows that a consideration is essential to a bargain and sale, and; this consideration must be of a pecuniary nature^o; for selling *ex vi termini*, supposes the transferring something for money, the common medium of commerce^p; if;

^b *Hayward's case*, 2 Co.

^o See 1 Co: 176; 2 Mod. 252; 1 Freem: 249; 2 Rol. Abr. 783; *Crossing v. Studamore*, Cro. Jac. 127; 1 Vent. 137; *Ward v. Lambert*, Cro. Eliz. 394.

35.

^c 1 Mod. 262; *Barker v. Kent*, 2 Mod. 252.

^m And see 2 Saund. Uses,

57.

ⁿ 1 Co. 87, b. 100, b; Co. Lit. 10, a.

^p 1 Co. 176, a.

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if, therefore, there be no such consideration, it can be no sale within the statute (1). Thus, where a man executed a bargain and sale of lands, in consideration of natural love and affection for his daughter, and for her preferment in marriage, it was held to be inoperative as a bargain and sale, because without a money consideration¹. So, if a man bargain and sell lands for "divers good causes and considerations," it is void, unless money be averred²; any trifling consideration, however, as a pepper-corn, &c. is sufficient for the purpose of raising an use.

But the actual sum paid by the bargainee need not be expressly stated in the deed, for if the deed say, for a "competent," or a "certain" sum of money, it is sufficient, for it is a sale if there be any money at all³.

So if a person, in consideration of so much money to be paid at a day to come, bargains and sells, the use passes presently, for it is equally a sale whether the money be paid presently or hereafter⁴.

And it is said that if there be a consideration of money expressed in the deed, no averment, nor evidence, can be admitted against it, for the affirmative is proved by the deed; and it is impossible to prove the negative⁵.

An use not being an estate to which recourse can be had to distrain, a rent could not, by the common law, be reserved on a bargain and sale⁶; but since the statute,

¹ *Crossing v. Scudamore*,
1 Vent. 137.

² 1 Co. 176, a; Moor, 578,
579; 1 Leon. 170; Plow.
533; *Ward v. Lambert*, Cro.
Eliz. 394, 462; 2 Rol. Abr.
784; Willes Rep. 677.

³ 2 Rol. Abr. 786; *Fisher*
v. Smith, Moor, 378, 570.

⁴ *Dyer*, 337, a, pl. 34;
1 Leon. 6.

⁵ *Gilb. Uses*, 287; 2 Rol.
Abr. 786; Moor, 378; *Dyer*,
90; *Shep. Touch.* 222, and
see *Thurle v. Madison*, Sty.
462; 2 Rol. Abr. 786.

⁶ *Co. Lit.* 144, a.

(1) *Quære*, Whether a loan of money will make a bargain and sale? and see cases cited, *Gilb. Uses*, 288.

a rent reserved on a bargain and sale, will be a sufficient consideration to raise an use in the bargainee^a.

And though a consideration be expressed to be paid by one of several parties to the deed, yet if the bargain and sale be to them all, the land will pass to them all, for it will be intended that the consideration was paid to them all, that the land may pass to them, according to the intent of the parties; and so generally, a consideration given to one of several parties, is sufficient to pass the land from all^a.

3. The last requisite to the validity of a deed of bargain and sale is, that it be enrolled. Enrolment of bargain and sale.

Before the statute of uses, livery of seisin was necessary for the passing a freehold in all corporeal hereditaments, but as the effect of this statute evidently would have been to render a freehold of all things not lying in grant, transferable by parol only, (or private conveyance), without any solemnity whatever, it was thought necessary, to prevent the inconveniences which might arise from a mode of conveyance so uncertain in the proof, and so liable to misconstruction and abuse^b, to enact, in the same session of parliament^c, "That no manors, lands, tenements or other hereditaments, shall pass from one to another, whereby any estate of inheritance of freehold shall be made or take effect, or any use thereof to be made, by reason only of any bargain and sale, except by writing indented, sealed and enrolled in one of the courts at Westminster, or else within the county or counties where the lands, &c. so bargained and sold, lie, before the *custos rotulorum*, and two justices of peace, and the clerk of the peace (1), or

^a *Wykes v. Tyllord*, Cro. Ab. 784, pl. 6, 7; Winch. 61. Eliz. 595.

^b Gilb. Uses, 90.

^c 2 Inst. 672; and see 2 Rol.

^c 27 Hen. 8, c. 16.

(1) But by 5 Eliz. c. 26, bargains and sales of lands in the county of Lancaster, may be enrolled in the chancery

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some two of them, whereof the clerk of the peace to be one; the said enrolment to be made within six months after the date of the same writing indented.

The objects of this provision appear to have been, first, to force the contracting parties to ascertain the terms of the conveyance, by reducing it into writing; secondly, to make the proof of it easy, by requiring their seals to it, and consequently the presence of a witness; and lastly, to prevent the frauds of secret conveyances, by substituting the more effectual notoriety of enrolment for the more ancient one of livery^d.

The latter part, however, of 27 Hen. VIII, c. 16, which, if it had not been evaded, would have introduced an almost universal register of conveyances of the freehold in the case of corporeal hereditaments, was soon afterwards defeated by the invention of the conveyance of lease and release, which sprung from the omission to extend the statute to bargains and sales for terms of years^e; and the other parts of the statute, were necessarily ineffectual in our courts of equity, because they were still left at liberty to compel the execution of trusts of the freehold, though created without deed or writing. But the inconvenience in this respect, of the statute of enrolments, is now in some

^d Co. Lit. 48, a, n. (3).

^e See *ante*, title "Release."

at Lancaster, or before the judges of assize there; lands in Cheshire, in the exchequer at Chester, or like judges of assize; lands in the bishopric of Durham, in the chancery at Durham, or the judges, &c. And by 5 Anne, c. 18, bargains and sales of lands in the West Riding of Yorkshire, may be enrolled before the registrar at Wakefield; and lands in the East Riding, or the town of Kingston-upon-Hall, may, by 6 Ib. c. 35, be enrolled at Beverley; and by 8 Geo. II, c. 6, s. 21, bargain and sale of lands, &c. in the North Riding, may be registered in the register office for that riding; also by 33 Geo. II, c. 30, s. 10, bargains and sales of lands purchased by the city of London, under that act, may be enrolled in the hustings of the said city.

measure obviated by 29 Car. II, c. 3, which provides against conveying any lands or hereditaments for more than three years, or declaring trusts of them, otherwise than by writing^f.

The enrolment of bargains and sales must be on parchment, that being implied whenever an enrolment is to be in any of the courts of record at Westminster; and in the clause of enrolment by the clerk of the peace, it is particularly provided, that he shall sufficiently enrol and engross it on parchment^g.

Lands in cities, boroughs or corporate towns having the privilege of enrolments, are excepted out of the act; for though the intent of the statute was, to have excepted them from enrolments in the courts of Westminster only, yet the statute is so worded that they are discharged from any enrolment at all; and therefore the possession of such lands is executed from the date of the deed^h.

And in many places this privilege (as before observed) is conferred by charter, and in many by express act of parliament (1).

The time limited by the statute for the enrolment of a bargain and sale is six months from the date, which is to be accounted according to the computation of twenty-eight days to the month, or lunar months; for month, in its proper and original signification, is the space of time measured by the complete course of the moon; as the year is the time measured by the complement of the course of the sunⁱ. And from the date, and from the day of the date, in this case, is taken as all one, (as according to some, it is in all other cases of computation) and therefore the enrolment may be on the day of the date, or on the last

Within what
time enrolment
to be.

^f See Co. Lit. 48, a, n. (3).

^g 2 Inst. 373.

^h 2 Inst. 676; Dyer, 29; Dalis. 63; Yelv. 124.

(1) See *ante*. p. 273, n. (1).

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day of the sixth month after the day of the date; for though, when an interest passes from the day of the date, the day itself is excluded; yet when a time is stinted, in which an act ought to be done, it is in order to hasten the doing of that act; and therefore the doing of it on the day from whence the period is first reckoned, within the time appointed and the last day of the sixth month, is within the words of the time given^k. And if the deed has no date, the six months are to be reckoned from the delivery, but not otherwise^l.

In consequence of the statute of enrolments, no seisin passes to the bargainee until the deed is enrolled; yet if it be enrolled within the time prescribed by the statute, it has relation and gives effect to the deed from the time of its execution. Hence all encumbrances created by the bargainor between the date of the deed and the enrolment are void as against the bargainee^m, unless a second bargainee get his deed enrolled before the first bargainee, and have no notice of such first bargaineeⁿ.

And although the bargainor or bargainee die before enrolment, it may, notwithstanding, be enrolled, for there are parties to give and take the interest when it begins to vest; as it vests from the date of the deed^o. But although the enrolment relates back to the time of the execution of the bargain and sale, so as to avoid all mesne incumbrances as against the bargainee, yet if a subsequent deed at the common law, as feoffment; recovery or fine, is made to the bargainee himself, between the execution and enrol-

¹ 2 Inst. 674; 5 Co. 1, b; 6 Co. 62; Shep. Touch. 223; Hob. 140; Dyer, 218, b.

^k Hob. 140; 1 Mod. 40, 42; 6 Ibid. 260; 2 Inst. 674; 1 Co. 6; 5 Co. 1, b; Dyer, 218, 282, b; 3 Lev. 483; 2 Salk. 413, pl. 1; 4 Leon. 4, pl. 18; Cowp. 718; Dougl. 463; 3 Durnf. & East, 623.

¹ Hob. 140; 2 Inst. 674; Mod. 42.

^m *Mallery v. Jennings*, 2 Inst. 674; Owen, 69.

ⁿ *Le Neve v. Le Neve*, 3 Atk. 646; 1 Ves. 64; Amb. 436.

^o 2 Inst. 674; *Dymock's case*, Hob. 130, 136; Cro. Jac. 408; And. 229, 337.

ment of the bargain and sale, he will be in by the common law, and not by the bargain and sale; for it is a rule of law, that when a conveyance by the common law, and a conveyance by the statute concur, that by the common law (except as hereafter mentioned) shall have the preference ^P (1).

V. OF THE EFFECT AND OPERATION OF A BARGAIN AND SALE, WHETHER BEFORE OR AFTER ENROLMENT.

As the statute requires the bargain and sale to be enrolled in order to its operation, the freehold is not fully vested in the bargainee until the enrolment of the deed; notwithstanding that the legal estate vests in him by the statute of uses immediately upon the execution of the deed; but the enrolment, when perfected, has relation back to the date or delivery of the deed; and the bargainee is considered, in judgment of law, as seised from that time; and hence all mesne charges and conveyances made by the bargainor, between the date and enrolment of the deed, are void as against the bargainee¹. If, however, the bargainor levy a fine or suffer a recovery to the bargainee himself before the enrolment of the bargain and sale, he shall take by the fine or recovery, and not by the bargain and sale; for since the freehold and use is in the bargainor till enrolment, it must pass by the recovery, &c. and when it has passed by the recovery, the use cannot arise, nor possession be executed from the date of the

^P 2 Inst. 671; 4 Co. 70, b; Inst. 674; Owen, 69; Moor, *Flower v. Baldwin*, Cro. Car. 41; 4 Co. 71, a; Cro. Car. 207.

¹ *Mallery v. Jennings*, 2 Dyer, 218.

(1) For the form of a bargain and sale, see Wilde's Sup. vol. i. No. xxxvi. p. 293.

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deed; and, as was before said, when two conveyances, one by the common law and one by statute concur, that by the common law shall be preferred, unless, on account of any mesne incumbrances created by the bargainor, it will be more for his advantage to take by the bargain and sale; in which case he shall be construed so to take, notwithstanding the fine or recovery¹.

And upon the execution of the deed, the bargainee hath immediately so far actual possession of the land that he is a good tenant to the *præcipe* for suffering a recovery, and may surrender, assign, alien, release, &c. before enrolment². And so if he die, his wife shall have dower out of the land, provided the deed be afterwards duly enrolled³.

But a bargain and sale, it is to be observed, operates merely upon the estate which the bargainor happens to have actually in him, and may lawfully convey, at the time of executing the deed. It therefore neither effects a discontinuance⁴, destroys a contingent remainder dependent upon a particular estate⁵, nor creates a forfeiture⁶. If, therefore, a tenant in tail convey his estate by bargain and sale to a purchaser in fee, the bargainee will have only a base fee, determinable upon the death of tenant in tail by the entry of the issue, who will not be put to his *formedon* on the death of his ancestor, but may enter and bring an ejectment; because the bargain and sale worked not a discontinuance of the estate tail⁷.

So if tenant for life, with contingent remainders depending thereon, convey his estate to another in fee by bargain

¹ See 1 Co. 671; 4 Co. 70, b; Hob. 322; 4 Leon. 43; Moor, 337; Shep. Touch. 226.

² 2 Inst. 675; Owen, 70.

³ Cro. Car. 217; 2 Burr. 1131; *sed vide* Shep. Touch. 226; Owen, 70, 150; Cro. Car. 110, *contra*.

⁴ Co. Lit. 332, b; and see Gilb. Uses, 297.

⁵ Hard. 416; Gilb. Uses, 140; Fearne, 472.

⁶ 4 Leon. 125; Gilb. Us. 102.

⁷ *Seymour's case*, 10 Co. 95; *Mackill v. Clarke*, 2 Salk. 619; and see 1 Atk. 2.

and sale, the bargainee will only take an estate for life, and the contingent remainder will not be destroyed^a.

By the express provision of stat. 6 Anne, c. 35, s. 30, it is declared, that in all deeds of bargain and sale, enrolled in *pursuance of that act*, whereby any estate of inheritance in fee-simple is limited to the bargainee, and his heirs, the words "grant, bargain and sell," shall amount to express covenants with the bargainee, his heirs and assigns, by the bargainor, for himself, his heirs, executors and administrators, that the bargainor is seized of an indefeasible estate in fee-simple, free from incumbrances, (except rents and service due to the lord of the fee), and also for quiet enjoyment against the bargainor, and all claiming under him; and for further assurance, unless the same be restrained by express words contained in such deed. And the same operation has been assigned by a late very able conveyancer^b to bargains and sale, in *general*. But as the provisions of the act of 6 Anne appear to extend only to deeds of bargain and sale of lands in the East Riding of York and Kingston-upon-Hull, there does not seem to be any foundation for giving the same forcible operation to those enrolled under the prior act of 27 Hen. 8.

And by 33 Geo. 2, c. 30, s. 10, (an act for widening certain streets in London,) it is enacted, that bargains and sales of lands, &c. purchased under that act shall, if enrolled in the *hastings* of the city of London, have the same force and operation as if fines or recoveries had been levied of them.

Upon the construction of the statute of enrolments it has been held, that as at common law the use passed from the delivery or date of the deed, and by the statute of uses, the possession passed as the party had the use at the time of the delivery; if the circumstances, added by the statute of enrolment are observed, it has the same effect which it

^a Hard. 416; Gilb. Uses, 140; Fearn, 472.

^b See 2 Pow. Wood, 44, n. (g), (h).

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had before at common law, to wit, to raise the uses from the delivery; for the words of the statute are only to add some things, and not to abolish or set aside the force it had formerly^c.

And so if two deeds of bargain and sale be made of the same lands to two several persons, and the last deed be first enrolled, yet if afterwards the first deed is also enrolled within the six months, the first buyer shall have the land; for when the deed is enrolled, the bargainee is seized from the delivering of the deed, to which time the enrolment will relate^d.

And if a man bargain and sell his manor, to which there is an advowson appendant, the bargainee can make no title to present before enrolment^e. For as the manor cannot pass till enrolment, neither can that which is appendant to it^f.

Nor, it is said, can a bargainee make a lease before enrolment; and though the indenture be afterwards enrolled, yet the lease is void, and the relation of the enrolment shall not make it good^g.

So if a man make a lease for life, reserving rent, with clause of re-entry, and then bargains and sells the reversion, the bargainee demands the rent, and the lessee refuses, and then the deed is enrolled, the bargainee cannot enter for the forfeiture; for till enrolment he is not grantee of the reversion within the statute capable of the duty, and consequently at the day could make no legal demand, which was precedently necessary to his entry^h.

And if a man bargains and sells lands by indenture, and then takes a wife and dies, and afterwards the deed is

^c Dyer, 218; Hob. 136; Car. 217; 2 Co. 56; 2 Bulst. 2 Inst. 674; Cro. Jac. 408; 8, 9.

¹ Rol. Abr. 627; Owen, ^f Fearne's Post. Wks. 30. 149, 150. ^g Carth. 178; Cro. Car.

^d Moor, 41; Cro. Car. 110. ^h Owen, 69, 150; Godb. 218, pl. 2; 284, pl. 27; Cro. 156; Latch. 157; 1 Sid. Jac. 409.

^e Jenk. 265, pl. 68; Cro. 310; Cro. Car. 217.

enrolled, the wife shall not be endowed¹. But if lands are bargained and sold, and a stranger enters, and then the deed is enrolled, and the bargainee dies, his wife shall be endowed².

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Though the bargain and sale be not enrolled at all, yet all distinct and independent covenants, to pay money, or the like, will notwithstanding be binding upon the party; but otherwise of relative and dependent covenants, which run with the land, as for quiet enjoyment, or the like¹.

Bargains and sales, though publicly acknowledged and enrolled, have not the authority of records, for they are notwithstanding but private contracts, and to be considered as such².

CHAP. III.

OF A LEASE AND RELEASE.

THE ancient mode of conveying land from one man to another, we have seen, was by feoffment; but the necessity of livery of seisin, to perfect the possession of the feoffee, being found in many cases very troublesome, "and begetting many nice questions," put lawyers upon devising some other mode of conveyance, which might be as effectual, without requiring the ceremony of livery. And they at length hit upon that which is now known by the above

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¹ 1 And. 161; Cro. Car. 115; 2 Rol. Abr. 786, M. 569.

¹ Salk. 199.

² 1 Salk. 199; 1 Lord Raym. 388; Moor, 35, pl.

² Gilb. Uses, 107.

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denomination (1), which, though its efficacy was at first greatly questioned, particularly by Mr. Noy, attorney-general to Charles the First^a, it has now almost wholly superseded the conveyance by feoffment; and from long use, if not upon principle, is become too firmly established to admit of its validity being reasonably questioned^b.

But though this mode of conveyance is now become the most common assurance of land, it will not, it is presumed, after the consideration which has already been given to the two species of deeds of which it is composed, namely, the *burgain and sale* under the statute of uses^c, and that species of *release* at common law which enures by way of enlargement^d, be deemed necessary that I should detain the reader longer upon it than may be sufficient to explain the manner in which it is contrived, and the reason of its operation.

The nature of the conveyance by lease and release is very perspicuously explained by Mr. Butler, in his incomparable annotations upon the first Institute of Lord Coke^e, and also by Mr. Booth, in an elaborate opinion upon a case which came before him in his practice, and has since been published^f, to whose remarks the student is to consider himself much indebted for the observations with which he is here presented.

^a See 2 Mod. 252.

^b See *Lutwich v. Mitton*, Cro. Jac. 604; Cro. Car. 110; *Barker v. Keble*, 1 Mod. 262; 2 Ib. 249.

^c See *ante*, chap. ii.

^d Ibid. chap. i.

^e See Co. Lit. 271, b, n. (1).

^f See 2 Ca. Op. 288.

(1) This conveyance is said to have been invented by Sir Francis Moor, (see 2 Mod. 252; 2 Salk. 678, pl. 5; 2 Ld. Raym. 798); and the occasion to which it was first applied, to have been on the settlement of the estates of Lord Norris, for the purpose of concealing from his kindred the mode in which he had settled his property. See Phil. Writ of Cap. 19.

As the form of this conveyance was originally derived from the common law, it is necessary to distinguish in what respects it operates as a common law conveyance, and in what under the statute of uses. At common law, when the usual mode of conveyance was by feoffment, with livery of seisin, if there was a tenant in possession, so that livery could not be made, the reversion was granted, and the tenant attorned to the reversioner; as by this mode the reversion or remainder of an estate might be conveyed without livery, when it depended upon an estate previously existing, it was natural to proceed one step further, and to create a particular estate, for the express and sole purpose of conveying the reversion, and then by a surrender or release, either of the particular estate to the reversioner, or of the reversion to the particular tenant, the whole fee vested in the surrenderee or releasee. It was afterwards observed, that there was no necessity to grant the reversion to a stranger; and that if a particular estate was made to the person to whom it was proposed to convey the fee, the reversion might be immediately released to him; which release, operating by way of enlargement, would give the releasee the fee, without the ceremony of livery of seisin, for the common law conceived it to be absurd to give livery to one who was already in possession. In all these cases, the particular estate was only an estate for years; for, at the common law, the ceremony of seisin is as necessary to create an estate of freehold, as it is to create an estate of inheritance; but still an entry would be necessary on the part of the particular tenant; for without actual possession, the lessee is not capable of a release operating by way of enlargement, as before entry he has only an *interesse termini*, and no actual possession. Hence, in the reigns of Henry 4 and Edward 6, we find it to have been usual, when a conveyance was intended to be made of the fee-simple, to execute a lease for three or four years, to the purchaser, and upon his entering upon the land, by virtue of the lease,

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to make a release to him of the reversion and inheritance, which operating as a merger of the prior estate for years, gave him as complete a seisin of the land, as if he had been in by feoffment or fine. But the inconvenience attending upon the necessity of actual entry by the lessee, in order to the operation of the release, put lawyers upon devising some mode of avoiding it. They therefore began to construe, that where the words and consideration of the conveyance were sufficient to raise an use, though it were but for a year or any smaller portion of time, the statute would carry the actual possession after it, and consequently make the lessee equally capable of enlarging his estate, by accepting a release, as if he had actually entered by virtue of the lease^s; and the consideration, if it were valuable, though never so small, was looked upon to be sufficient for the raising of an use, and therefore 5s. or other like trifling sum, came to be used as the consideration (1), and a lease for one year as the term; both of which in time grew to be things merely of course and form, for the 5s. was seldom or never paid; but the lessee by his acceptance of the lease upon such consideration, was estopped to aver any thing against it. The necessity of entry for the purpose of obtaining the possession was thus superseded or made unnecessary by the statute of uses; for by that statute the possession was immediately transferred to the *cestui que use*; so that a bargainee under

^s *Lutwich v. Mitton*, Cro. *Barker v. Keate*, 2 Mod. Jac. 604; Cro. Gar. 110; 249, 253.

(1) It was made a question, whether a lease for a year, upon no other consideration than reserving a pepper-corn, (if demanded), could operate as a bargain and sale, and so make the lessee capable of a release; and it was resolved that it should, the reservation making a sufficient consideration to raise an use in the same manner as a bargain and sale does. *Barker v. Keate*, 1 Mod. 262; 2 Ibid. 249; 2 Vent. 35.

that statute is as much in possession, and as much capable of a release before or without entry, as a lessee is at common law after entry. All, therefore, that remained to be done, to avoid, on the one hand, the necessity of livery of seisin from the grantor, and on the other, the necessity of an actual entry on the part of the grantee, was, that the particular estate, (which, for the reasons above-mentioned, should be an estate for years), should be so framed as to be a bargain and sale within the statute. Originally it was made in such a manner, as to be both a lease at the common law, and a bargain and sale within the statute; but an opinion having obtained, that where conveyances may operate both by the common law and statute, they shall be considered to operate by the common law, unless the intention of the parties appear to the contrary^h, it became the practice, in order to bring the lease more effectually within the statute, to insert the words "bargain and sell" only, which together with the consideration were held, even at common law, sufficient to raise an use; and then the statute carried the possession accordingly, without any actual entry made by the lessee; and to bring the lease still more effectually within the statute, it afterwards became customary at the end of the lease to say, "that such lease was made to the intent that, by virtue of the statute of uses, the lessee might be in actual possession, and be thereby enabled to accept and take a grant and release of the freehold and inheritance thereof;" and this form is still continued, and seems the most accurate and technical mode of framing it.

The bargain and sale, therefore, (or lease for a year as it is generally called), has its operation and effect solely from the statute of uses; for it is a bargain and sale to the use of the bargainee for one year, and the use is derived out of the estate of the bargainor; so that the bargainor,

Operation of the
lease for a year.

^h See *Lord Altham v. Earl* and *Dyer*, 186; *Com.* 313; *of Anglesey*, *Gilb. Rep.* 17; *Skin.* 209.

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upon the sealing of the bargain and sale, immediately stands seised to the use of the bargainee for one year: and, inasmuch as where an use is created by virtue of the statute of uses (27 Henry 8,) such use must be derived out of and under the seisin of some other person, this answers what is required by the statute; because instantaneously, upon the sealing of the bargain and sale, an use is created for the benefit of the bargainee for a year; and then it may be predicated of the bargainor, that he immediately stands seised to the use of the bargainee for such one year. And the statute saying further, that wherever any person stands seised to the use of another for any estate or interest, he for whose benefit such use is limited shall be deemed to be in possession of the land for a like estate and interest as is limited to him in the use, the force and operation of the statute is such, that the bargainee is deemed to be in the actual possession of the land for the year as effectually as if a lease had been made to him for a year at the common law, and he had actually entered into the land by virtue of that lease¹.

And these bargains and sales, being of chattel interests, are not required to be enrolled: for leases for years, at the time of passing the statute of enrolments², being very precarious interests, they were then considered as not worth regarding, and were therefore omitted in framing the statute of uses.

Operation of
the release.

This being the operation of every lease for a year made by force of the statute of uses, it is now to be seen what is the operation of a release, when grounded upon such preceding lease for a year. Now, a release to a bargainee or lessee for a year, where it grants to a bargainee a larger estate or interest than he had before, is that species of release which is called a release operating by way of enlargement of the estate; and this is a conveyance at

¹ See the case of *Short- Raymond, fd. 798.*
ridge v. Lamplugh, in 2 Ld. ² 27 Hen. 8, c. 26.

the common law. And where an estate, either of freehold or of inheritance in fee, is granted to the bargainee by such release, the releasee gains and acquires such freehold, or such inheritance in fee, merely by the rules of the common law. For example: if such release of the lands be to the bargainee, to hold to him, his heirs and assigns, this is the limitation to him of an estate in fee-simple at the common law. So if the words be, "to hold to him, his heirs and assigns, to the only use and behoof of him, his heirs and assigns," this is also a conveyance operating merely by the rules of the common law: for these words, "to the only use and behoof," being directed and applied to the very same person who first takes under the *habendum*, and not to the use of "another," (which the statute requires), do not give or create any statute-use, but serve only to express, in a more explicated manner, that the releasee is to take the estate in fee-simple to himself and his heirs, for his and their own use and benefit, which is an use at the common law, and not a statute-use. But where the *habendum* is expressed "to the releasee, his heirs and assigns, to the use, not of himself, but of some third or "other" person or persons, as of A. for life, then to B. for years, or in tail; then to C. D. E. and F. or to ten or twenty others, for ten or twenty different estates," these will all be statute-uses, and the persons for whose benefit such uses are expressed, must, under the very words of the statute, be taken to be in actual possession, or to have actual vested interests in the lands, according to the estates limited by such uses respectively. And so if there are powers reserved to the said A. B. C. D. E. and F. to make leases, jointures, &c. the lessees or jointureesses, as soon as any such leases or jointures are made, will have an use or estate in the lands for those terms which are created by the leases or jointure deeds (provided such estates and interests quadrate with the powers), and the terms, estates and interests, will be

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uses derived by force of the statute out of the seisin of the releasee¹.

It may hence be perceived, that every statute-use must be derived out of the seisin of some third person, so that it may be always predicated, that "there doth or do exist some person or persons who doth or do stand seised to the use of the said *A. B. C. D. E. and F.* for years, life, or in tail, &c. as aforesaid; and where there is not such standing seised by some such third person, such statute-use is not good²." For example: suppose there be such a bargain and sale, or lease for a year to *J. S.* as has been just mentioned, and then a release be made to him of the lands, to hold to him and his assigns for his life, or to hold to him and his assigns generally (leaving out the word "heirs"), to the use of *A.* for life, with remainder to *B. C. D. E. and F.* successively, for life, years, or in tail, as before mentioned; and afterwards *J. S.* were to die; all these uses would be void; because *J. S.* acquiring by the release no larger estate or seisin than for his life, and that being determined by his death, there would remain nothing out of which the uses could be derived to the persons in remainder; for it could not be predicated that the heirs of *J. S.* stood seised to the use of the several persons named in the deed, the heirs not being named, and if some person or persons did not stand seised to those uses, the case would not fall within the provision of the statute of Hen. 8, which turns no uses into legal estates but such as were trusts before the statute, where there was always a third person who held the estate, and whose conscience was bound by the trust. And the words of the statute are so framed as to be conformable to the old usage: for it expressly says, that wherever there is a "person seised" to the use of any "other person," he to

¹ See 2 Ca. Op. 288; and *ante*, "Uses and Trusts."

² *Ibid.*

whose use he is seised shall be deemed to be in possession of the land for the same estate as he has in the use; to which case alone therefore it is confined: now no part of this doctrine can be applied to conveyances or releases, under which nothing passed but bare legal estates or old common law uses; as if the *habendum* in the release was to be to *J. S.* and his assigns, to the use of the said *J. S.* and his heirs, or to the use of the said *J. S.* and the heirs of his body begotten; this would not be a statute-use, as has been already observed, but would be the limitation of a legal estate, and be good, notwithstanding the death of *J. S.* as not wanting the support of the statute-uses. Thus in the case of *Jenkins v. Young*^a, where one Readhead gave land to Edward Randall and his wife, *habendum* to the said husband and wife, to the use of them and the heirs of their two bodies; and for want of such issue, to the use of Edward Morgan and his heirs; it was argued, that the estate out of which the use was to arise, being no more than an estate for life, the use could not make the estate larger than the limitation; but the judges said, they conceived there was a difference where an estate was limited to one, and the use to a stranger: for there the use should not be more than the estate out of which it was derived: but when the limitation was to two, *habendum* to them, to the use of them and the heirs of their bodies, that was no limitation of the use: nor was the use to be executed by the statute; but it was a limitation of the estate to them, and the heirs of their bodies; and they were in by course of common law; for the estate and the use are both in one and the same person; and therefore this cannot be a statute-use, for the seisin doth not go or belong to one person, and the use to another person; whereas the statute requires that there should be a standing seised by some third person or persons to the use of some other person; and so it ought to be taken as a limi-

^a Cro: Car. 230, 244.

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tation to them and the heirs of their bodies; remainder to the other, and the heirs of the other; that the deed might be construed according to the intent of him that made it^o.

Suppose again an estate be limited to hold to *D.* and his heirs, to the only proper use and behoof of the said *D.* his heirs and assigns; here, you observe, the use is not limited to any person different from the person to whom the estate is granted; the *habendum* is to *D.* and the use is limited to *D.*; so that the estate and the use are both to one and the same person, and therefore this cannot be a statute-use; for the seisin doth not go or belong to one person and the use to another person: what the statute requires is, that there should be a standing seised by some person or persons to the use of some other person. And the case of *Young v. Jenkins*^p, is express, that where the use is not divided from the estate, but the use and the estate are together, there it amounts only to a limitation of the estate, and consequently is not a statute-use, but only a common law use. And so if at this day a man should enfeoff *J. S.* to hold to the said *J. S.* and his heirs for ever, this could not be a statute-use, for the words would import no more than the words "for his and their sole benefit and behoof," and would only serve to show in how ample and beneficial manner the feoffee was to take the estate limited to him by the *habendum*, which being manifestly an estate at common law, could not give or create a statute-use also. The words of Lord Holt in the case of *Lord Altham v. Earl of Anglesey*^q, are directly in point: "If a fine (says he) be levied to a man and his heirs, to the use of him and his heirs; in this case he shall take by the common law and not by the way of use." In like manner it would be if there were a feoffment to a man and his assigns, to hold to that man and his assigns, to

^o 2 Ca. Op. 288, 291; also
Ibid. 143.

^p Cro. Car. 230, 244.

^q Gilb. Rep. 10.

the only use and behoof of him and his assigns during his life; that would only limit an estate of freehold to him for his life at common law, and not be the limitation or creation of any statute-use. It would be the same in case of feoffment of lands, to hold to the feoffee and his heirs, to the only use and behoof of the feoffee and his heirs, during the lives of *A. B. C. D.* and twenty other persons; the words "to the use and behoof" would pass no statute-use, nor pass anything distinct from the estate; which estate would be an estate at common law, and the words "to the use and behoof," would serve only to show an amplitude of the estate given by the feoffment, and that the feoffee and his heirs were to take the same for his and their own benefit, without return of any service whatever to the donor. Yet in this case, as nothing but a freehold descendible would pass, the reversion and inheritances must be understood to be still left in, and to return immediately after the livery of seisin to the feoffee and his heirs (1).

(1) A short but very clear explanation of the conveyance by lease and release is also given by Sir William Blackstone in his invaluable Commentaries, which, as it is of the first importance that the student should have a clear conception of this mode of conveyance, on account of its great frequency in practice, I shall transcribe, in addition to the above observations. "The conveyance by lease and release is thus contrived; a lease, or rather bargain and sale upon some pecuniary consideration, for one year, is made by the tenant of the freehold to the lessee or bargainee: now this, without any enrolment, makes the bargainor stand seised to the use of the bargainee, and vests in the bargainee the use of the term for a year; and then the statute immediately annexes the possession. He therefore, being thus in possession, is capable of receiving a release of the freehold and reversion, and accordingly the next day a release is granted to him. This is held to supply the place of livery of seisin: and so a conveyance by lease and release is said to amount to a feoffment." 2 Com. 338. But see a material difference between these two species of assurances noticed Co. Lit. 207, a, n. (3).

A lease and release has therefore a mixed operation, the
 U 2 lease

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It has been said, that the possession of the bargainee under the lease is not so properly merged, as enlarged by the release, but at all events it does not after the release exist distinct from the estate passed by the release.

As the operation of the release depends wholly upon the efficacy of the lease, or bargain and sale for a year, it is material that the bargainer should be a person capable at law of being seised to an use, otherwise the release will be void for want of possession in the bargainee, for no person who is incapable of being seised to the use of another can make a bargain and sale under the statute. It has therefore been said by some very respectable authorities, that a corporation cannot make a good bargain and sale¹. To avoid doubt, therefore, upon this subject, it seems advisable, that corporations should convey by feoffment, or by a lease at common law, with an actual entry by the lessee previous to the release, after which the release will unquestionably pass the reversion.

It is also requisite that the property, which is intended to be the subject of the conveyance, be capable, from its nature, of being conveyed to uses, or it cannot be transferred by lease and release².

It is further requisite, in order to the operation of this conveyance, that a privity should subsist between the lessor and lessee, releasor and releasee³. If, therefore, *A.* seised in fee, make a lease to *B.* for ten years, and then *B.* make an under-

¹ See Poph. 72; 1 Co. 508; *sed vide* 1 Leon. 183; 127, a; Bacon's Uses, 347; 2 Ibid. 121; 3 Ibid. 175. Plow. 102, 538; Jenk. Cent. ² See *ante*, vol. i. p. 524. 195; 2 Ves. 399; Gilb. Uses, ³ Lit. s. 517; Co. Lit. 272, a, 5, 170, 285; Shep. Touch. n. (1). 296, a, n. (2).

lease having the operation of and being in fact a bargain and sale under the statute of uses, and the estate of the releasee being extended or enlarged to an estate of inheritance by the operation of the release at the common law.

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lease "to C. for five years of the same lands, C. cannot take a release of the reversion and inheritance from A, because in this case there is no privity between A. and the under-tenant C. but the privity is between A. and his immediate tenant D. But yet it has been said, that though A. in this case cannot release to C. and his heirs for want of privity, yet he may confirm the estate of C. to hold to him and his heirs, and this will enure by way of confirmation to enlarge the estate of C. and be good; *sed quare*; and therefore it may be advisable to insert the word "confirm," in the deed of release, in addition to the words "grant, alien and release."

As in exchanges at the common law, if one of the parties die before the exchange is executed by entry, the exchange is void, it seems proper to make exchanges by lease and release, by which means this inconvenience will be avoided, as the statute executes the possession without entry, and all incidents annexed to an exchange at common law will at the same time be preserved.

CHAP IV.

OF A DEED OF DECLARATION OF USES (1).

WE have already observed, that conveyances made on good consideration will, unless it be otherwise expressed, enure to the absolute use of the grantee, and those without a consideration to the use of the grantor^a. Where, therefore, such enurement does not accord with the inten-

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^a Co. Lit. 273, a.

^a See Dyer, 18.

(1) See a very perspicuous explanation of the nature, use and construction of this instrument, Cru. Uses, 106.

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tion of the parties, it becomes necessary to declare the purposes which the deed is intended to accomplish.

This is particularly the case with regard to fines and recoveries, for "if they be levied or suffered without any good consideration, and without any uses declared, they, like other conveyances, enure to the use of him only who levies or suffers them^b. And though a consideration appear, yet as the most usual fine, '*sur cognizance de droit come ceo, &c.*' conveys an absolute estate, without any limitation, to the cognizee; and as common recoveries do the same to the recoveror, these assurances could not be made to answer the purposes of family settlements, in which a variety of uses and designations is very often expedient) unless their force and effect were subjected to the direction of other more complicated deeds, wherein particular uses can be more conveniently expressed^c."

Now we have seen, that though where lands are conveyed by feoffment, fine or recovery, the legal seisin and estate becomes vested by the operation of these conveyances in the feoffee, cognizee or recoveror, by the common law; yet if the owner of the estate declares his intention that such feoffment, fine or recovery shall enure to the use of a third person, an use will immediately arise to such third person, out of the seisin of the feoffee, cognizee or recoveror, and the statute will transfer the possession to such use. In consequence of these doctrines, where uses are intended to be raised upon a fine or recovery, or feoffment, the lands are transferred by one of those conveyances to some indifferent person, who stands in the place of the ancient feoffee to uses, and a deed is afterwards executed, reciting, that by means of a fine or recovery the lands had been transferred to A. and B.; and declaring, that the fine or recovery so levied or suffered shall enure and operate, and that the cognizee or recoveror in such fine or recovery shall be seised of such land, to the use of a third person;

^b See Dyer, 18.

^c See 2 Blac. Com. 363.

or else a deed is first executed, reciting, that a fine or recovery is intended to be levied, or covenanting to levy a fine or suffer a recovery, and declaring, that those assurances when completed shall enure to the use of a third person. In both these cases an use arises out, of the seisin of the cognizee or recoveror, to the person to whom such use is declared, and the statute immediately transfers to that use, the actual possession and legal estate. In cases of this kind, the deeds by which the uses of fines and recoveries are manifested, derive their effect from the statute of uses, the legal estate being transferred to the persons named in the declaration of uses by the operation of the statute^d. Where such declarations are made previous to a fine or recovery, they are called deeds to lead the uses, but if made subsequent to the fine or recovery, they are termed deeds to declare the uses^e.

In treating of these species of instruments I shall consider,

I. WHO MAY DECLARE USES.

II. UPON WHAT CONVEYANCE, AND IN WHAT MANNER, THEY MAY BE DECLARED.

III. OF THE CONSTRUCTION OF DECLARATIONS OF USES.

I. WHO MAY DECLARE USES.

As courts of equity do not set up rules of property contrary to the rules of law, those who have not a disposing power by law cannot raise an use; and consequently a feme covert, or baron and feme, cannot declare uses upon a feoffment or other common conveyance so as to bind the wife^f. But baron and feme may levy a fine, or suffer a recovery of the wife's lands, or in which she is entitled to dower, and declare the uses, which will bind the wife; for here the law allows her a disposing power, because

^d See Cru. Uses, 107.

^e 2 Blac. Com. 363.

^f Gilb. Law of Uses, 39;

Colgate v. Blythe, And. 164, pl. 209; Cru. 106.

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she is privately examined, consequently it must be allowed them to declare what is the design of that fine; and therefore, such declaration by them both shall bind the wife^k. Likewise, if the husband only declares the uses, this shall bind the wife, (even though she be under age)^l, unless she dissent from it; for since she joins in the fine, she must be presumed to concur in the design of it, unless the contrary appear by some manifest sign of dissentⁱ. And an actual dissent seems necessary; for an acquiescence in the uses for a length of time after the death of her husband has been held to bind her^j. But if, upon a fine being levied by the husband and wife, the uses be declared by him only, and the wife refuse to execute the declaration, she will not be bound, as her refusal is an express indication of her dissent^k.

So if the husband and wife join or agree in the declaration of the uses of a part of the land, and differ as to the rest, it will not be good for the whole, but for that part only as to which they agree^l. Or if the husband declares the uses of the fine one way, and the wife another, this binds the husband only during the coverture, but not the wife afterwards; for the husband cannot declare the uses without the concurrence of the wife, because he has no estate: and she cannot be presumed to concur where the contrary appears by her deed^m. And the wife alone cannot declare the uses, because during marriage she is not *sui juris*, and, without the husband, has no disposing powerⁿ. And if there be no use declared upon this fine, it is to the

^k 2 Co. 57, a; *Beckwith's* case, Moor, 197; *Ibid.* 22, pl. 73; *Lusher v. Banbong*, Dyer, 290, a; *Harrington's* case, Owen, 6; and see Cru. Uses, 132; 2 Rol. Abr. 798.
^l 2 Rol. Abr. 798.

ⁱ 2 Rep. 57, a; 2 Rol. Abr. 798.

^j *Swanton v. Raven*, 3 Atk. 105.

^k *Webb v. Worsfield*, 2 Rol. Abr. 798; Gilb. Uses, 248; 2 Rep. 57, b.

^l Gilb. Uses, 216.

^m *Beckwith's* case, 2 Rep. 57; Moor, 197. *Quere*, whether the declaration be not merely void? and see Gilb. Law of Uses, 40, 216; Cru. Uses, 134.

ⁿ *Johnson v. Cotton*, Skin. 275.

use of the wife; for where there is no other intent of a fine declared, it is supposed to be designed as a further security to the present possessor; and the use is still in the wife, since in this case she has not parted with it^o (1).

A distinction has however been taken^p between a limitation of the use of a part of the *estate* in the land, and of an use of part of the *land* itself. Thus if husband and wife differ in the limitation of the particular *uses*, but concur in the limitation of those in remainder, the whole of the uses will be void; but if they agree in the limitation of an use of a part of the *land* itself, and vary in the declaration of the use of the residue, the declaration will be good in respect of the part in which they agreed, and void only for the rest^a.

And it is to be observed, that as conveyances by feoffment, and lease and release, do not bind the wife, though she be a party, so any declaration by her and her husband, of uses raised by those conveyances, will, as to her, be void likewise^t. But if husband and wife bargain and sell land for money, and afterwards levy a fine to the bargainee, the bargain and sale is considered merely as a declaration of the uses of the fine, and will therefore be binding on the wife^r; for though the deed of a feme covert is not valid in law, yet the deed having relation to the fine, takes validity from thence, and will therefore conclude her^t.

An idiot, or person of *non sane* memory, if permitted to levy a fine, may declare the use of a fine or recovery,

^o *Johnson v. Cotton*, Skin. 275. ^r *Gilb. Uses*, 244.
^p See *Beckwith's case*, ubi supra. ^t 2 Co. 57, a; *Moor*, 22, pl. 73.
^a 1 Saund. Uses, 178. ^r *Jones v. Morley*, 1 Lord Raym. 287; 12 Mod. 259.

(1) A fine shall bind the wife though she be within age; but it is said that such a fine is reversable for the non-age of the wife, during her non-age. Cro. Eliz. 129; *Charnoicke & Ur. v. Worsley*, 2 Rep. 77, b; *Lord Cromwell's case*, *Gilb. Law of Uses*, 41.

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which will continue valid as long as the conveyance upon which the uses are declared remains in force^a. And it is the same of an infant, who may limit an use upon feoffment, fine or recovery; and he cannot countermand or avoid the use, without first avoiding the conveyance^b. For the law supposes from the record, that the cognizor or recoverer was of full age; and the fine or recovery being good, the deed to declare the uses, which is considered as part of the conveyance, is good likewise: but courts of equity will not suffer any declaration of use by an infant to bar his heirs, if obtained in a fraudulent manner^c. But an agreement by an infant to levy a fine to uses when he comes of age will not operate as a declaration of uses of the fine levied in pursuance of his covenant^d; and a covenant by an infant, in consideration of marriage or blood, to stand seised to uses, will be wholly void^e.

And if an infant covenant to levy a fine when he comes of age, and levy it accordingly; yet if, being of full age, he declare other uses of such fine, those and not the prior uses shall stand^f.

It is observable in general, that every man may declare and dispose of the use according to the estate and interest he has in the land^g; and therefore, if two joint-tenants levy a fine, and declare the uses severally, each man disposes of his own moiety; but if they declare no uses, they are seised as before^h. So if tenant for life and he in

^a *Beckwith's case*, 2 Co. 58, a; *Macsfeld's cases*, 12 Co. 124; *Leving's case*, cited 10 Co. 42, b; *sed vide* 4 Leon. 89; 2 Ves. 403; 3 Atk. 315.

^b Lord Bacon on the Statute of Uses, 67, 355; 2 Co. 58, a; 10 Co. 42, b; 3 Atk. 710; Moor, 22, pl. 73.

^c See 2 Co. 58, a; *Addison v. Dawson*, 2 Vern. 678.

^d *Nightingale v. Ferrers*,

3 P. Wms. 207; and see *Addison v. Dawson*, 2 Vern. 678.

^e Bacon's Uses, 67; Cru. Uses, 136.

^f *Frost v. Wolverston*, 1 Stra. 94.

^g Bacon's Uses, 67; Cru. Uses, 136.

^h 2 Co. 58, a, b; Cru. Uses, 138; Noy, 21, 27; Palm. 406.

remainder in fee join in a fine^c, without declaring any uses, they are seised as they were before^f.

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But if the remainder-man is party to, and seals a deed, in which the tenant for life *alone* covenants to suffer a recovery, &c. to certain uses, this does not bind the remainder-man, though he in the remainder afterwards join in suffering the recovery, &c.^g Nor if tenant for life, and remainder-man in tail, and reversioner in fee, levy a fine or suffer a recovery, a declaration of uses by the tenant for life alone does not bind the remainder-man without his privity, nor if it be by the remainder-man will it affect the reversioner^h.

In like manner if *A.* seised in fee of certain lands, and *B.* a stranger join in a common recovery, without declaring any uses, the use shall arise to him that had the interest in the land, and not to the strangerⁱ. So, where the father was tenant for life, remainder to the son in tail, a *præcipe* was brought against the father, who vouched the son, and a common recovery was had; and the indenture recited, that the recovery was made between the father and others; but inasmuch as there was no proof of the consent of the son to such declaration, nor was he party to the indenture, the court directed the jury to find the uses according to the estate which the parties had at the time of the recovery^k.

The king may declare uses by letters patent^l; as may also the queen declare uses^m.

^c 2 Co. 58, a, b; Cru. Uses, 138; Noy, 21, 27; Palm. 405.

^f Cru. Uses, 139.

^g *Per* Master of the Rolls in *Nightingale v. Ferrers*, 3 P. Wms. 210, n. (b); but note, the remainderor was in this case an infant.

^h *Roe v. Popham*, Dougl. 25.

ⁱ 2 Rol. Abr. 789, a.

^k *Argol v. Cheney*, Lat. 82; Palm. 405, S. C.; Noy, 77, S. C.

^l Bac. Uses, 66; 1 Saund. Uses, 175.

^m *Ibid.*

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USES.II. UPON WHAT DEED, AND IN WHAT MANNER, USES
MAY BE DECLARED.Upon what
deed.

USES may be declared on any deed operating by transmutation of possession, as feoffment, lease or recovery, by a separate writing, distinct from the conveyance by which the possession is transferred; but on such as operate by virtue of the statute of uses, as bargains and sales, and covenants to stand seised, no use can be declared or averred, but what is either contained within the deed, or the law avers^a: these being themselves, in fact, nothing more than declarations of uses; for the use being served out of the seisin of the bargainor or covenantor, they merely serve to declare the use to the bargainee or covenantee. And upon conveyances by feoffment, and lease and release, it is now invariably the practice to declare such uses, and usually in the same deed, immediately after the *habendum*^o. But with respect to fines and recoveries, the uses are always declared by a separate deed executed either previously or subsequently to the levying or suffering it^p (1).

^a 1 Co. 176; Dyer, 169,
pl. 21.

^o 2 Ca. Op. 289.
^p See 1 Saund. Uses, 72.

(1) After the statute of Hen. 8, it was doubted, whether, if any fine were levied, or recovery suffered, without any *previous* declaration of the uses, any subsequent deed could direct them? for it was conceived, that upon levying the fine, or suffering the recovery, the use resulted to the cognizor or recoveree, and was immediately executed by the statute: so that the use being once vested and executed by the statute, it could not be divested by any subsequent declaration. It was however fully determined in *Downman's* case, 9 Co. 7, b; and see Dyer, 136, a; that, though it was true that the use resulted to the cognizor or recoveree, yet it remained so only until the subsequent declaration respecting it was made, upon which it was immediately executed agreeably to the tenor of such declaration; and on the other hand, when the statute 29 Car. 2, c. 3, passed, directing

Before the statute of frauds¹, a parol declaration of the uses of a fine was good². But since that statute, all declarations and creations of trusts of lands or hereditaments must be in writing signed by the party, or by his last will in writing, or else be void, except only trusts arising by implication of law, and transferred and extinguished by act of law; but it is not necessary under this statute, that the declaration of uses should be sealed, because it does not derive its effects from the common law, but only from the statute; and is, in truth, not a deed, but only an instrument in writing³; and therefore, *per* Holt, if a bargain and sale declaring the uses of a fine or recovery be not enrolled, or a deed of feoffment be not executed by livery, they will be effectual to declare the uses⁴.

Nor are any technical words necessary for declaring the use, nor even that the word use should be mentioned; for

¹ 29 Car. 2, c. 3.

² *Jones v. Morley*, 4 Mod. 269.

³ *Shortridge v. Lamplugh*, 7 Mod. 76.

⁴ 1 Ld. Raym. 291; *Jones v. Morley*, 12 Mod. 163.

directing that all creations and declarations of uses should be in writing, it was doubted, whether these resulting uses upon fines and recoveries were not so executed as to preclude any *subsequent* declaration of them; see *Gilb. Uses*, 62, and *Saund. Uses*, 173; for it was imagined, that the statute required the use to be declared either previously to or at the time of levying or suffering such fines and recoveries; to obviate which doubt it was enacted by 4 Anne, c. 16, s. 15, that declarations of the uses of fines and recoveries should be as effectual when made after the levying or suffering the same as if the statute 29 Car. 2, c. 3, had not been made. See *Bushell v. Busland*, Holt, 733, where the declaration of uses was *four years* after the fine had been levied.

The student is however to observe, that, as this statute mentions *fines* and *recoveries* only, there is still room for the same doubt, with regard to a conveyance by *feoffment*. And see 1 *Saund. Uses*, 174.

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any thing clearly shewing the intention of the parties will be sufficient for this purpose^a.

As the direction and disposition of uses and trusts is guided by the courts of equity according to the presumptive intention of the parties, there is no regular or fixed form for the declaration, provided it be in writing pursuant to the statute of frauds^b.

Under the exception of the statute is held to be a contract made by a person who purchases land in the name of another; with respect to which, therefore, no declaration in writing is essential. This implied trust may, however, be rebutted by circumstances in evidence; and, therefore, where a father has purchased in the name of his son, or a grandfather in the name of his grandson, it has frequently been held to have been intended as an advancement for such *son or grandson*, and *not* for the *purchaser*. And this construction of *trusts* by a court of equity is conformable to the construction of *uses* by the courts of law; where a feoffment *without consideration*, when no use was declared, was always held to operate to the use of the feoffor, but when it was to a *son or grandson*, the *consideration of blood* intervened, and it was held to operate to the use of the son or grandson.

This doctrine is often resorted to in the case of grants of copyholds, where the son of a grantee is a nominee: in which case the implication in favour of the son is not so strong, as there is a necessity of mentioning some life for the purpose of filling up the estate; but still it is so far considered as an advancement for the son, unless in particular cases^c, as to throw the proof of a contrary intention in the father upon the person claiming against the child^d.

^a 1 Lord Raym. 291; 3 P. Wms. 209.

^b 1 Saund. Uses, 208.

^c *Lane v. Dighton*, Amb. 409.

^d Co. Lit. 8vo. 290, b, n. (1). viii.

It has been shewn in a preceding page, that a declaration of uses may be made either before or after the time of making the assurance; for although it was formerly doubted, whether a deed, executed subsequent to the fine or recovery, could operate so as to direct the uses, by reason that, as the use of the land (where there was no consideration) immediately resulted back to the cognizor or recoverer, it could not, it was thought, be divested or affected by a subsequent agreement or declaration; yet it was afterwards held, that such uses might be declared by a deed subsequent^a; for the deed declaring, the intent of the parties to be, that at the time of the recovery, &c. the recoveror should stand seised to those uses, no averment could be admitted to prove the contrary. The stat. 29 Car. 2, however, afterwards declaring, that all declarations or creations of trusts of lands, &c. should be manifested by some writing at the time of their creation, it was again doubted, whether, since that statute, declarations of uses or trusts of recoveries or fines, made after their being levied or suffered, were effectual, hence it was by 4 & 5 Anne, c. 16, s. 15, enacted, that "all declarations or creations of any uses or trusts of any fines or common recoveries of any lands, &c. manifested by any deed made after the levying or suffering thereof, should be as good and effectual in law, as if the act of 29 Car. 2, c. 3, for prevention of frauds or perjuries, had not been made."

If a precedent indenture be made to direct the uses of a subsequent assurance, it is but directory till the assurance is made, and then the land is bound, and the cognizor or recoverer cannot by any act of his, after the recovery had, charge or avoid it; but if the declaration be subsequent, and in the interim between the assurance had and the declaration of the uses, the cognizor or recoverer sells, or gives or charges the lands to others, this subsequent declaration

^a *Arthur v. Basset*, Dyer, 136; *Downman's case*, 9 Co. 7, b.

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will not subvert the mean estates, charges or interests, unless it can be otherwise proved, that by a certain and complete agreement of the parties, the assurance was had and made to these uses^b.

It is not necessary in declaring an use, if there be a transmutation of possession, to use the word "*use*;" any expression by which the mind of the party may be known, that such an one shall have the land, being sufficient^c.

But in a declaration of uses, the lands ought to be described in the same manner, and with as much minuteness, as in a lease or grant, for as lands are described in a fine or recovery only by the number of messuages, acres of arable, pasture, &c. in the same manner as in a *præcipe quod reddat*, it is proper to have a more particular description in the deed of uses, which is the measure that usually guides juries in ascertaining the estates comprised in a fine^d. And there are many instances where the Court of Common Pleas has directed the description of lands in a fine to be amended, in conformity to the deed of uses^e. "Hence," *per cur.* "there is an obvious propriety in connecting the description in the fine with the description in the deed; there is also an advantage in stating in the deed the description contained in the fine."

No consideration is necessary in a deed to lead or declare the uses of a fine or recovery; although in the case of a bargain and sale, or covenant to stand seised to uses, we have seen that a consideration is essential^f. The reason of the difference, is this, "in the former case, (viz. that of a declaration of uses), the estate is passed completely from the grantor or donor, without the aid of a court of equity; and therefore it is immaterial whether the

^b *Countess of Rutland's* case, 5 Rep. 26; *Downman's* case, 9 Rep. 10, 11, &c. Raym. 290; 12 Mod. 162.

^d 1 Bro. Ca. in Parl. 156.

^e Cru. Uses, 111.

^f *Per* Holt, Chief Justice,

^f 1 Inst. 123, a, n. (8);

in case of *Jones v. Morley*,

¹ Lord Raym. 290.

3 P. Wms. 209; 1 Lord

use declared on the estate is gratuitous or not, it being sufficient that the grantee or donee receives it, coupled with a trust or use. But in the latter case, (viz. that of a bargain and sale, or covenant to stand seised), the transaction rests in covenant or agreement between the covenantor or bargainor and the *cestui que use*, and if the covenant or agreement was not founded on the consideration of blood, or a valuable consideration, such as marriage or money, our courts of equity, which till the 27 Hen. 8, had the sole cognizance of uses, would not interpose to compel the performance. In fewer words, chancery would enforce uses annexed to a perfect gift, however gratuitous they might be, but not those resting on a naked contract, without even so much as the consideration of blood to maintain them^s."

And it is to be observed, that a deed declaring the uses of a fine or recovery, although perfected, may nevertheless be altered or controlled by a subsequent deed^a; but a second deed to lead the uses of a fine or recovery, must be executed by all those who were parties to the first deed, and concerned in interest, in order to make the first deed void; for if the second deed be only executed by some of the parties concerned in interest, and not by all of them, it will not avoid the first deed¹. For *per* Lord Hardwicke, in the case of *Stapleton v. Stapleton* cited below, "though it is true, that where there is an agreement to suffer a recovery, and uses are declared, if the recovery is afterwards suffered, though it varies in point of time from the recovery covenanted to be suffered, yet if there is no subsequent declaration of uses, the recovery will enure to the uses so declared; and before the statute of frauds, if the deed declaring the uses had not been

^s Co. Lit. 123, a, n. (8). 159; Show. P. C. 140, affir.

^a *Vavasor's* case, Dyer, ¹ *Stapleton v. Stapleton*, 307, b; *Jones v. Morley*, 1 1 Atk. 2; and see *Fleetwood* Lord Raym. 287; 12 Mod. ² *Templeman*, 2 Ib. 79.

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pursued, a parol declaration of the uses would have been admitted; but if there was a deed declaring the uses, and the recovery was suffered accordingly, that would, before the statute, have excluded a parol declaration of new uses. But even now there may be a subsequent declaration of other uses, but that declaration must be in writing, and such a new declaration of uses depends upon the agreement of the parties; therefore, though it was said at the bar, that the declaration of uses is in the power of the tenant in tail, and that he may declare new uses, I take that not to be law; for such subsequent declaration of uses must be by all the parties concerned in interest; and in the case of the *Countess of Rutland*^k, his lordship observed, "it is not laid down that the tenant in tail may declare new uses, but it is said, whilst it is directory only, new uses may be declared, and the meaning of that is, that as the new uses must arise out of the agreement of the parties, the parties may change the uses, but that must be done by the mutual consent of all the parties concerned in interest; if not, it cannot control the first declaration."

III. OF THE CONSTRUCTION OF DECLARATIONS OF
USES.

BEFORE the statute of frauds it was said in *Shelley's* case, that the construction of devises, and of estates conveyed in use, was the same, viz. according to the meaning of the parties^l; and in a case reported by Croke, the court said, that a declaration of uses should be expounded as a will^m. And in Carthew's report of the case of *Leigh v. Brace*, the court is stated to have said, that a conveyance by way of use had always been construed like a will, with respect to the intention of the parties, and was not

^k 5 Rep. 25.^l 1 Ibid. 101, a.^m *Carter v. Ringstead*, Cro. Eliz. 208.

tied up to the strict forms of conveyances at common law*. But it is observable, that although this case is more fully reported by Lord Chief Justice Raymond and Salkeld*, yet no mention is made by those reporters of the courts having laid down any such doctrine. And in the case of *Makepeace v. Fletcher*†, a limitation in a covenant to stand seised to the use of *Anne* the daughter of the covenantor, and the issue of her body, was determined to pass no more than an estate for life; although it was contended, upon the authority of the case of *Leigh v. Brace*, as reported by Carthew, that a conveyance by way of use should be construed like a will, and therefore that *Anne* took an estate-tail. Also in the case of *Rigden v. Vallier*, where the question was, whether in a covenant to stand seised, the words, "equally to be divided," created a tenancy in common, Lord Hardwicke is reported* to have expressed himself, that, "it is objected that there is no warrant to construe a deed to uses, as to the limitations and words of it, in a greater latitude than a conveyance by way of feoffment, or other conveyance at common law; and that if construed in a different manner, it would cause a great confusion, which I hold to be true in general, for the statute joining the estate and the use together, it becomes one entire conveyance, by force of the statute, and the words are to be construed the same way, but this is to be taken with some restriction: as to the words 'of limitation in a deed,' they are to be sure to be construed in that manner, viz. in the same sense; but where they are words of regulation or modification of the estate, and not words of limitation, I think there is no harm in giving them greater latitudes in deeds on the statute of uses (which are trusts at common law) than on feoffments, which are strict conveyances at common law." This case of *Rigden v. Vallier*

* Carth. 343.

Holt, 668, and 5 Mod. 266.

* 2 Lord Raym. 101; 3

* Com. Rep. 457.

Salk. 337; and see Rep. t.

* 2 Ves. 257.

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is also reported by Atkyns, by whom his lordship is stated to have said, "it would be very inconvenient to construe a covenant to stand seised, different from conveyances at common law, but here are words of regulation, or modification; and I do not see any harm in giving them a reasonable construction to answer the intention". So in the case of *Goodtitle v. Stokes*¹, which arose in the Court of King's Bench, two years after the case of *Rigden v. Vallier*, it was determined, upon the authority of Lord Hardwicke's decree, in the last-mentioned case, that the words "equally to be divided," in a deed of uses, created a tenancy in common². And, observes Mr. Cruise³, if it should be established that conveyances to uses, which are now become the common assurances of the realm, were to be construed in the same manner as wills, even with respect only to the words of regulation or modification of the estate, such a doctrine would in some degree tend to introduce all that latitude and uncertainty which now prevail in the construction of testamentary dispositions. Of this opinion was also the late Mr. Booth, who observes, that "if deeds of uses must be governed by the same rules as prevail in the construction of wills, then a limitation to a man's male descendants, or male children, may create an estate-tail; and an absolute inheritance may pass by a limitation, to the use of the grantee for ever, which will produce infinite confusion". And his opinion appears to be sanctioned by a modern determination of the Court of Chancery, in a case where, in a marriage settlement, lands were conveyed to trustees and their heirs, in trust to permit the husband and his assigns to take the rents and profits for ninety-nine years, if he should so long live, and after his decease, to permit the wife to take the rents and profits for life, and after the decease of

¹ 3 Atk. 734.² See Cru. Uses, 60, 143.³ 1 Wils. Rep. 341; Sayer's Rep. 97.⁴ 2 Cases and Opinions, 279.

the survivor of them, upon trust to permit and suffer all and every child and children of the marriage, to take the rents, issues and profits, in such shares as the husband should appoint; and for want of appointment, "in trust to permit and suffer all and every such child and children; to receive and take the rents, issues and profits of the said premises, to them and their heirs for ever". And the question being, whether the children of the marriage took as joint-tenants or tenants in common, the father not having made any appointment, Lord Thurlow, Chanc. decreed, that according to the true construction of the settlement, the estates comprised therein were to be considered as settled on the children of the marriage in joint-tenancy, subject to the power of appointment. And when, on a re-hearing, it was contended that the children took as tenants in common, upon the ground that deeds deriving their effect from the statute of uses are to be construed according to the intent of the parties, so as it be not contrary to law (and the case of *Rigden v. Vallier* was cited as an authority in point); his lordship observed, that he should be sorry to give in to the opinion, that "deeds to uses, in the nature of wills, should be construed so widely as wills have been; for that no good has been done by the wide construction of wills." And his lordship afterwards said, "that whether the settlement was to be considered as a conveyance of a legal estate, or a deed to uses, it would make no difference, and that he therefore continued of his former opinion".

With respect to deeds made prior to a fine or recovery, although they are only directory, and do not bind the estate in the land immediately, yet if such fine or recovery be afterwards levied or suffered according to the deed, they will enure to the uses declared in such prior deed: and no averment will now be admitted to the contrary,

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deeds to lead
uses of fines, &c.

* *Stratton v. Best*, 2 Bro. Rep. 233. 1 Cru. Uses, 145.

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unless it be by other matter in writing^a. But formerly, in the case of a variance between the deed and the subsequent fine or recovery, averments might have been made, that the fine or recovery was intended to enure to a different use from that declared in the deed. And still, where it is agreed by indenture that a fine shall be levied of certain lands, by the name of a certain number of acres, to particular uses, and a fine is levied of the lands, but there is some difference in the number of acres, or the fine is levied to one only of the parties mentioned in the indentures, so that there is a variance between the indenture and the fine, yet an averment will be admitted that the fine was levied to the use of the indentures: for the original agreement of the parties was declared by writing; and although there be some small variance in quantity, person, time, or the like, yet the law, which in common conveyances hath great respect and regard to the intent of the parties, and to the substance and effect of their original agreement, will allow of an averment to accord the fine and the indenture, when an averment is made that there was no further consideration or agreement, but that the fine was levied to the uses contained in the indenture^b.

Second declaration of uses.

And where a second deed to lead the uses of a fine or recovery is executed previous to such fine or recovery, by which different uses are declared from those contained in the first indenture; and the fine or recovery is levied or suffered pursuant to the second indenture, the uses shall be directed by such second indenture; for as both declarations are in writing and under seal, and made between the same parties, they are equally authentic, and the second deed being presumed to be founded on a new agreement, shall prevail^c.

^a *Countess of Rutland's Ca.*
5 Rep. 26, a; Cro. Jac. 29.
^b *Idem.*; *Lord Cornwallis's*
case, 2 Rep. 76, a.

^c See *Jones v. Morley*,
1 Lord Raym. 287; 12 Mod.
159; Show. Parl. Ca. 140.

But with respect to deeds made subsequent to the levying a fine or suffering a recovery, it was formerly doubted whether they would operate so as to direct the uses of such prior fine or recovery^d. Because where a fine was levied or a recovery suffered without consideration, the use of the land immediately resulted back to the original owner; and when the use was once vested, it was doubted whether it could afterwards be revoked by a subsequent declaration or agreement^e. But afterwards, such a subsequent declaration was adjudged to be valid, and sufficient to declare the uses of the fine or recovery^f. Thus, where Peter Vavasor suffered a common recovery, and a deed was afterwards executed by him, in which the uses of the recovery were declared; it was unanimously resolved, by the Court of Common Pleas, that such indenture subsequent was sufficient to direct and declare the uses of the precedent recovery against the said Peter Vavasor and his heirs; it being declared by the deed, that the true intent and meaning of all the parties, at the time the recovery was suffered, was, that the recoverors should stand seised to the uses therein mentioned; against which express affirmation and declaration by deed indented, the said Peter Vavasor or his heirs should never be admitted or received to say, that no such uses were declared at the time of the said recovery, but that the said recovery, notwithstanding the said subsequent declaration, should be construed and adjudged by force of an use, implied by operation of law, to be to the use of the said Peter and his heirs. And that the declaration by the said deed indented, should have this operation in law against the said Peter and his heirs, that there was a present, certain, and complete agreement and declaration of the said uses at the time of the recovery, for so the indenture expressly purports, and this stood upon good and apparent reason,

^d 9 Rep. 8; b. 9, b.^e *Downman's case*, 9 Co. 7.^f *Cru. Uses*, 125, 148.

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for inasmuch as Peter and his heirs were only to take advantage for want of a declaration of uses, reason required that the declaration of the said Peter by his deed indented, should stand against him and his heirs^c. But it was also resolved by the Judges in this case, that where there is an indenture subsequent, declaring the uses of a prior recovery, an averment may be made, that other uses than those contained in such indenture, were expressed and limited before and at the time of the recovery, and that in this case Peter Vavasor had, after the recovery was suffered, conveyed or charged the lands, (which conveyance or charge would be defeated and annulled by the subsequent declaration), there such subsequent declaration should not, of itself, subvert the mesne conveyance or charge, unless it could otherwise be proved that, by the certain and complete agreement of the parties, the recovery was had to such uses; for, by judgment of law, such declaration subsequent shall be sufficient only, where no other certain and complete declaration or limitation of any other use, either at the time or before the recovery, was made, or any mesne estate or interest was vested^d.

Also a deed subsequent to a recovery, declaring the uses thereof, may be controlled by a posterior deed of the same kind. Thus, where a feme sole, having land by descent from her father, suffered a common recovery, and afterwards willed and granted by indenture between her and one A. B. whom she intended to marry, that immediately after the solemnization of the marriage, the recoverors, their heirs and assigns, should stand and be seised to the use of the said husband and wife, and of their heirs for ever, and to no other use. The marriage took effect, and afterwards the recoverors having notice of the indenture and marriage, executed by deed an estate to the husband and wife, and to their heirs in fee. And then the husband and wife by indenture made between them

^c *Downman's case*, 9 Rep. 7. ^d 9 Rep. 10, b. 11, a.

and the heir of the wife on the part of her father, reciting that inasmuch as the land came to her by her father, and as she had no issue of her body, notwithstanding the purport of the indenture and conveyance aforesaid, the true intent was, that the issue of the body of the wife should inherit the land, and for default thereof, her next right heirs: it was accordingly by the same indenture fully concluded, bargained and agreed for them and their heirs, that the husband and wife in future should stand and be seised thereof to the use of themselves in special tail, remainder to the right heirs of the wife. Upon the death of the husband, who survived the wife, a question arose on a special verdict, whether the heir of the husband, or the heir of the wife, was entitled to the land; and it was resolved by all the Judges of the Court of Common Pleas, for the heirs of the wife, because they held that the first indenture was corrected by the second¹.

And in conformity to the doctrines established by those cases, a deed was held to be a good declaration of the uses of a fine, which had been levied four years before, the deed expressing a declaration of the uses of all fines, whether already or thereafter to be levied².

CHAP. V.

OF AN APPOINTMENT OF USES.

THE only species of assurance which remains to be considered as deriving its effect from the statute of uses, is that of appointment.

¹ *Vavasor's case*, Dyer, Trusts, 179; Cru. Uses, 128. 307, b; see also Bacon's ² *Bushell v. Bushell*, 11 Abr. Uses and Trusts, (E); Mod. 196; Holt. Rep. 733. and see 1 Saund. Uses and

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Conveyances by appointment of uses, owing to the great frequency of powers of appointment and revocation contained in marriage settlements, and the form of limitation recently introduced for the prevention of dower, are now to be reckoned amongst the most common assurances in use; and claim, therefore, the student's very particular attention. But as this mode of conveyance derives its efficacy from the power upon which it is made, it will be proper, previously to the instrument of appointment itself, to consider the nature and general doctrine of Powers ¹. The subject of the present chapter will therefore be divided into,

- I. THE NATURE AND ORIGIN OF POWERS OF APPOINTMENT.
- II. BY WHOM AN APPOINTMENT MAY BE MADE IN PURSUANCE OF A POWER.
- III. TO WHOM SUCH APPOINTMENT MAY BE MADE.
- IV. THE MANNER IN WHICH IT MUST BE MADE, IN RESPECT OF EXTERNAL FORM.
- V. ITS OPERATION AND CONSTRUCTION WHEN MADE.
- VI. THE MEANS BY WHICH IT MAY BE REVOKED, DEFEATED, OR VARIED.

I. OF THE NATURE AND ORIGIN OF POWERS OF APPOINTMENT.

THE principles upon which the alienation of real property at the common law was founded, and the mode of effecting it by feoffment and livery of seisin, did not admit of the annexing to the conveyance a power of revocation or appointment; for it not only seemed repugnant that a man, after giving an estate *absolutely* to another, should yet reserve to himself a liberty to recall it from the grantee at pleasure; or to determine it, and create a new estate to another without a new livery, but it was also inconsistent with that public notoriety which the policy of our ancestors deemed a necessary circumstance in the alienation of

¹ Tracts, 86.

property^b. The only means, therefore, which our ancestors had of retaining any authority over real property, after they had once alienated it, was, by annexing a condition to the feoffment; that on the tender of a certain sum of money, or the performance of some other thing by the alienor to the alienee or his heirs, the alienor should have a right of re-entry; by which means the land, which was divested out of the alienor by the livery of seisin, was, by a performance of the condition and re-entry, re-vested in him as of his original estate. But when the doctrine of uses was introduced, this difficulty no longer subsisted; for, though such a shifting of estates was repugnant to the nature of common law conveyances, yet it was perfectly agreeable to the nature and intent of an equitable use, which had for its main object, the enabling the owners of real property to dispose of their estates in any manner most agreeable to themselves.

This distinction between an equitable use and a legal estate may be illustrated by considering the nature of an estate in land at common law, as opposed to that of an use in equity. Land being a solid substantive, standing of itself without any dependance on any thing else, the possession of it was transferrible from one to another by the visible symbolical act of livery *only*: the most durable interest in it was a fee-simple: when this interest was destroyed by a condition, the possession of the land was, upon entry, re-vested in the original owner, and could not pass out of him again without a new livery. But an use was an *accident* attaching upon the *legal* possession, and built upon it by civil equity. Its *essence* was no more than a *confidence* reposed in him who had the possession; to this effect, namely, that so long as that possession continued, he should admit the feoffor to take the profits, and should make such estates as the feoffor required. That designation of property, then, which we call a *limitation*

Origin.

^b Co. Lit. 237, a; and see n. (1); 2 Saund. Uses, 8, 81; Co. Lit. 271, b, 342, b, Cru. Uses, 178.

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of an use, is no more than the direction of a trust, prescribed by the feoffor to the feoffee, which direction might be subjected to such conditions and limitations as the donor pleased: and the donee was bound, *in equity*, to perform the trust according to these directions, so long as the possession remained with him. Hence it followed, that the feoffor might limit an use in fee-simple to one, upon condition or limitation, and after the determination of that use, to another; all which limitations were performable by the donee, because the possession which he had received, subject to the trust, remained in him undetermined: and if the donor or feoffor could not have limited a future use upon the determination of the first, the donee or feoffee would have retained the possession without any trust, which would have been contrary to equity and conscience. The principle then upon which uses were founded, being that the donee of an estate, accepting it upon a confidence, was bound in conscience *strictly* to pursue the directions of his donor, the operation upon the conscience of the donee was the same, whether the stipulation was to permit the donor to recal the estate back to himself at pleasure, or for the donee to hold it in trust for others named in the original conveyance, or in trust for persons *at the future* appointment or nomination of the donor. These powers, therefore, were originally *mere* modifications of uses, taking effect as directions to trustees, which bound their consciences, and which they were compellable, in a court of equity, to perform. And this mode of conveyance was preferable to that by way of condition, because if, in the latter case, the condition were to be broken, the heir only could take advantage of it, which would frustrate the intent of the feoffor; whereas, in the former case, a court of equity compelled a strict performance of the trust in favour of any person nominated by the donor to take the beneficial interest. Now, though these powers, as modifications of uses, were acted upon by the 27 Hen. 8, for transferring uses into possession, and, by

the operation of that statute, all that was equitable in them was transferred into a legal estate; yet that statute made no alteration as to the essential distinctions before mentioned between the *use* and *possession* (1).

Powers, when considered with relation to the donee, may, in respect of their different operations, be esteemed as of two distinct kinds: namely, as restraining powers, or, as enabling powers. Restraining powers are, when the owner of an estate conveys it to trustees, reserving a power to himself to revoke, alter, enlarge, or diminish the trusts declared in the deed, which power is reserved to be executed under particular circumstances *only*, and under certain *restrictions*; and it is called a *restraining* power, because the owner of the land, who might alienate it by

Different kinds
of powers of ap-
pointment.

(1) This will be evident from considering the words and intent of the statute. The words of the statute we have seen effected three things. First, they transferred the possession to the use, if they found a seisin to the use; secondly, they transferred a possession in the *estate* of the use; thirdly, they *blended* that possession with the quality, form, and condition of the use: by these effects no alteration whatever was made in the limiting of an use, but *that* remained as it was before the statute. The intent of the statute was to remedy the mischiefs recited in the preamble, which were *frauds* and *wrongs* that fell upon the king and others by the disjunction of the use and the possession, and these are remedied as soon as the possession is added to the future use, as at present: for in both respects, *cestui que use* has the possession to forfeit, charge, and encumber. No alteration then of the common law in the raising or limiting of present or future uses being made by the statute of 27 Hen. 8, but uses remaining, as to these points, different from possessions, as they were before the statute; they, being from their pliability so much more convenient for the purposes of society than conveyances at common law, came into general use and fashion; and these powers of revocation and appointment, of course, came into fashion likewise: for, after the statute, as before, the performance and execution of the power transferred the estate to the new uses, or re-vested the estate in him that created the power without any re-entry; which no common law conveyance could effect. See Pow. Pow. 5.

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any mode of legal conveyance, restrains himself from alienating it by any other means, or under any other circumstances than those prescribed to himself by the terms of the power. Enabling powers are those which confer upon persons, not seised of the fee, the right of creating interests to take effect out of it which could not be done by the particular tenant or donee of the power, unless by virtue of such delegated authority; these, therefore, conferring the right of creating interests, to take effect out of estates which are not vested in the persons having power to create such interests, are called enabling powers; in this sense, a power reserved to a man as tenant for life in an estate moving from himself, but settled in strict settlement upon the consideration of marriage or other valuable consideration, is an enabling power; for those, who claim by virtue of such settlement, are, in contemplation of law, the owners of the estate, and the tenant for life is to be viewed merely as a particular tenant, exercising a power vested in him by the settlement, which is valid *so far* only as authorized by such settlement.

These may again be divided into powers *relative*, and *collateral* powers. Relative powers, or powers *relating* to the land over which they are to be exercised, are those which are reserved to the owner of the land, or to a person deriving, under the instrument creating the power, either a present or future estate or interest in the land^c. Collateral powers are those which are given to mere strangers, that is to say, to persons who were not owners of the land at the execution of the instrument creating the power, and who do not take under it either a present or future estate or interest in the land, these being *collateral* to and not derived out of any estate in the land over which they are to be exercised^d. An instance of a collateral power is where powers of sale, exchange, &c. are given to trustees in a marriage settlement^e, or where a *cestui que vie* devises

^c Co. Lit. 342, b, n. (1); Hard. ^d Ibid.

that his feoffees shall sell his lands : here the power to sell is *merely collateral* to the right in the land ; for the feoffees are strangers and take no interest in the land itself, but are *barely* empowered to sell or dispose of an interest out of the land^f. Again, if there be a feoffment in fee by A. to divers uses, with *proviso*, that, if B. shall revoke them, the uses shall cease, B. has no interest in the estate, subjected to his power, nor can gain any by revoking or not revoking ; and, consequently, the person in whose favour he executes the power, or who eventually benefits by his execution of the power, takes nothing from the donee of the power ; whatever interest accrues to him, is derived solely from the author of the power, and in no shape from him who executes it.

And as powers relating to the land are a part of the ownership of the donee, they are liberally construed to effectuate the intent ; but collateral powers being given to mere strangers, and giving a bare authority only, are strictly construed within the words of the power^g.

Collateral powers may moreover be either general or special. General ; as where D, possessed of a term for years during the life of B, devised that if M. should die, living B, then M. should have power, before her death, to grant an annuity to *any person* she should nominate, and to charge the term therewith^h. Special ; as where A. devised lands and tenements to his wife for life, and then to be at her disposal, *provided* that she disposed of the same, after her death, to *any of her children*.—The latter of these are, for distinction, called powers of specificationⁱ.

Relative powers, or powers relating to the land, are those which are given or reserved to some person having an estate or interest in the land over which they are given,

^f 1 Rep. 111, 174.

^g Cowp. Rep. 267.

^h *Gibbons et al. v. Moulton*,
et al. Finch, 346.

ⁱ *Dighton v. Tomlinson*,
Comyns, 194 ; 1 Salk. 239,
S. C. ; and see *Carter*, 232.

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and these may be either appendant, *i. e.* annexed to the estate in the land, or in gross. Powers are said to be annexed to the land where the donee has an estate in the land out of which the estate to be created by the power is to take effect in possession during the continuance of the estate to which the power is annexed^k. Of this sort is the power frequently given in settlements to *tenants for life*, when respectively in possession, to make leases for one-and-twenty years, or three lives, or the like. So where a power is given to a jointress, by her marriage settlement, to make leases for twenty-one years *in possession*^l. So where a man covenants to levy a fine to the use of himself for life, with remainder to his son in tail, remainder over; with a proviso in the indenture, that, if he grant, bargain or sell the land to another, or appoint other uses, it shall enure to such uses, and a fine be levied accordingly^m; for these powers not only operate in the nature of emoluments to the estate of the donee; but are also appurtenant, or annexed to his estate; and, *when created*, are to be executed *out of*, and must be *concurrent with*, and have their being and continuance, (at least for some part), out of the estate for life, or other estate of the donee.

Powers in gross are, where the person to whom they are given has an estate in the land, but the estate to be created under or by virtue of the power is not to take effect until after the determination of the estate to which it relatesⁿ. This power in gross may either be vested in a person having a *particular estate* preceding the power, but of which the power is independent; (as, where a tenant for life of an estate settled by a stranger has power to make an estate which is not to begin until after his own estate be determined; as a power to make a jointure, or limit a term to commence in possession after the death

^k Hard. 415; Co. Lit. ^m *Snappe v. Turton*, Sir W. Jones, 392.

342, b, n. (1).

^l 3 Salk. 276.

ⁿ Hard. 415; Co. Lit. 342, b, n. (1); Sugd. Pow. c. 1, s. 5.

of the tenant for life *); or which may be reserved by the owner of the estate to himself, by way of power to take effect out of a settlement; (as, where a man, seised in fee, or in tail, doth by fine settle his lands to the use of himself for life, reserving therein a power to create an estate by lease or otherwise, to commence after his death, for the raising money for younger children's portions, or for securing a jointure): and these powers are called *powers in gross*, because the estate or interest of the party, who is to execute them, is *not affected* by them. Powers appendant, and in gross, are also sometimes called powers with an interest; because, although the estates raised under such powers take effect *out of the estate* of the original creator of the power, yet the donee of the power has an interest in the estate as well as in the exercise of the power^p; either, if it be a restraining power, as a power of revocation to re-vest the estate in himself, &c. or if it be an enabling power, to transfer the estate; or destroy such power by fine, feoffment or otherwise; therefore the person to whom it is limited, is, in law, considered as coming in under him who executes the power; and, in such case, he who gives *operation to and limits the use* is looked upon as the donor, and therefore his power is not considered as *merely collateral*, but savours (as it is said in the pithy language of antiquity,) of the estate and interest in the land^q. And a power may be so circumstanced, with relation to the land upon which it is to operate, that, as to one estate in such lands, it may take effect as a power in gross, and, as to another, as a power appendant: thus, where lands are settled by A. to the use of himself for life, with power to make a jointure; and also leases for years, to commence after his death, for raising younger childrens portions, with remainder over in tail, reversion in fee in himself: here,

* *Edwards v. Slater*, Hard.
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^p *Digger's Ca.* 1 Rep. 174.

^q Hard. 415.

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the power to make leases, is a power in *gross* as to the *remainder in tail*, but *appendant* as to the *reversion in fee*’.

II. BY WHOM AN APPOINTMENT, IN PURSUANCE OF A
POWER, MAY BE MADE.

ALL powers, as well those which are collateral as those which are relative, take effect, we have observed, out of the estate vested in the creator of the power; and their legal operation is by *authority* of the instrument which gives the power, and not of the instrument by which it is executed’. Hence it follows, that the incapacities which subsist respecting the disposition of legal estates by *femes covert*, infants, &c. do not in all cases hold in respect to the execution of powers of appointment. For as the appointee takes the estate by the instrument in which the power is reserved, and not by the deed by which the power is executed, he derives no interest from the appointor, who is merely an instrument, by means of whom the intent of the person conferring the power is carried into effect; and it is therefore immaterial whether the appointor is such a person as is capable *sui juris* of holding or conveying such an estate or not.

Feme covert.

Thus though it has been seen in various parts of the present work, that at common law a *feme covert* has no disposing power over her possessions, yet as this disability arises solely from the solicitation which the law takes to protect her interest from any undue influence which might be exercised over it by her husband, and not as in the case of an infant, to any supposed incapacity of mind or volition; yet even at the common law she was allowed to execute a power or authority which she was to exercise merely as a ministerial act, without parting with any

’ *Edwards v. Slater*, Hard. 6 Rep. 17, b; 2 Ves. 78; 2 Atk. 568; Comyns, 497.

410. ’ *Sir Edward Clere’s case*,

interest in the thing appointed¹; and the courts of equity will give effect to any voluntary demonstration of her desire to exercise an ownership over her estates or interests, in all cases where such a power has been reserved to her, and where, by a strict observance of the forms previously prescribed, to attend such disposition, it appears to be her own deliberate act, and not the effect of surprise or accident.

Thus, where the power is simply collateral to the estate, it is agreed that a *feme covert* may execute it, notwithstanding that, at the time it was delegated to her, she was sole; for, whenever she executes the power, the *cestui que use* of the power does not derive any interest from the donee of the power, (who is merely an instrument, or conduit-pipe to carry into execution the intent of the donor of the power;) but is in *immediately* by and under the instrument creating the power, unaffected by any intervening acts of such donee. Thus, where A. seised of a messuage in fee, devised it to his wife, to dispose of at her will and pleasure, and to give to *such* of his *sons* as she thought best². The wife married a second husband, and then executed the power vested in her, by feoffment to the second son of the devisor; and the court agreed unanimously, that the act of the wife was good, notwithstanding the coverture.

So where a person conveyed lands to trustees to the use of his wife for life (after his decease), with a power for his wife to grant leases; and after the husband's death she married again and demised the lands, it was held to be a good execution of the power, notwithstanding her coverture; for the court said, the estate of the lessee was not derived from the lessor, but arose out of the estate of the trustees to uses³.

¹ See 1 Inst. 112, a, n. (6); 137; Noy, 80; Latch. 11; *Goodill v. Brigham*, 1 Bos. 39, 135.

& Pul. 192.

² *Bayley v. Warburton*,

³ *Daniel v. Ubley*, W. Jones, Com. Rep. 494.

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So where a man devised his freehold lands, &c. to his wife for life, and *then* to be at her disposal, *provided* that she disposed of the same *after her death* to any of her *children* ^v. The wife, having issue by the testator, a son and a daughter, married again, and executed the power in favour of her daughter. Upon its being questioned whether the wife took an *estate* or a naked power only by the will, and, if a power *only*, whether her coverture rendered her incapable of executing it? the court were unanimously of opinion that the wife had, under the will, an estate for life *only*, with a power of *specification* simply collateral; and that the power was well executed, notwithstanding the coverture.

And though the power be appendant or in gross, and the donee be a feme sole, the better opinion seems to be that she will not, by her subsequent marriage, render herself incapable of executing the power; she being, as to her interest in the power, considered, in equity, as a feme sole ². And it was determined by Lord Chancellor *King*, that a feme covert might exercise a power of *appointment* of her own estate; which, *per* Hardwicke, Chancellor, is the common case, where a power is given to a woman, tenant for life, to execute leases ⁷. And where lands on a marriage were settled, with a proviso that it should be lawful for the wife to demise the premises in such manner as tenant in tail might do by the statute 32 Hen. 8²: the wife on surviving her husband, and marrying again, demised the premises conformably to the power; and it was held that it was a good execution of the power, notwithstanding the coverture; and that no fine was neces-

^v *Dighton v. Tomlinson*, Comyns, 194; S. C. Salk. 239; Lucas, 31, 71; *vide* 1 P. W. 154, his argument in S. C.; *et vide* *Gibbons v. Moulton*, Finch, 346; 3 Leon. 71, pl. 108; *et* *Liese v. Satingstone*, 1 Mod. Rep. 189.

² *Harris v. Graham*, 1 Rol. Abr. 329, pl. 12; S. C. 2 Ib. 247, pl. 6.

⁷ *Herle v. Greenbank*, 3 Atk. 712.

² *Bayley v. Warburton*, Comyns, 494.

sary; for the estate of the lessees was not derived from the lessors, but arose out of the estate of the feoffees or releasees named in the original settlement: and that, therefore, nothing more was requisite to the raising an estate to the lessee, than what was required by the deed which created the power (1).

So where real estates settled to such uses, &c. and in default of appointment to her and her heirs, a conveyance by her in execution of her power, as a security for her husband's debts, was decreed to be carried into execution; for, *per curiam*, a feme covert is considered by the court, with respect to her separate property, as a feme sole; if therefore a feme covert sees what she is about, the court allows of her alienation of her separate property^a.

But if a power to appoint be *expressly* reserved to be executed by the feme "*being sole*," a subsequent marriage will suspend the operation of the power, and she cannot exercise it during coverture^b, because in this case the

^a *Pybus v. Smith*, 3 Bro. 343, 344; 3 Salk. 276; and Rep. Chan. 340; 1 Ves. jun. see 1 Sid. 101, S.C. but the circumstance of the power

194-
^b *Marquis of Antrim v. Duke of Buckingham*, 1 Cha. being reserved to the wife, "being sole," is not mentioned. Ca. 17; S.C. 1 Eq. Ca. Abr.

(1) A distinction must, however, be remarked between the cases of a power reserved to a feme covert, to be executed through the medium of an use or trust, and a power annexed to an estate in *fee-simple*, given to a feme covert, directing or qualifying the control she shall have over the fee; for though the former will be good, the latter will be deemed inconsistent with the absolute estate previously given, and therefore void. Thus, where a testator devised a farm, &c. to his sister, her heirs and assigns for ever; adding his will to be, that she should enjoy and dispose of the same as a feme sole, independently and without the control of her husband; this latter power was (on her attempting to dispose of the estate by way of release, without fine,) held to be void, as inconsistent with the previous estate given to her in fee-simple, which must necessarily be subject to the rights given by the law to the husband in such estates of the wife. See *Goodill v. Briggam*, 1 Bos. & Pul. 192.

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power was not pursued: for by the marriage she put herself in the power of her husband, and it was the deed of her husband and not hers. And the Lord Keeper took a difference between a power flowing from an interest, as in this case, and a mere naked power; for he said, that although where a bare power is given to a feme to sell; and she afterwards marry, she may nevertheless sell the lands even to her husband; yet, where such a power flows from an interest, it should be executed whilst sole, notwithstanding the liberal construction now put upon such powers.

And although the power rest in articles only providing for its being contained in a settlement afterwards to be made, but which is never executed, yet it may be executed by her. Thus where, by articles previous to marriage, it was stipulated, that all estates coming to the wife should be settled to her sole use, and subject to her appointment by deed or will, but no settlement was made; yet Lord Northington, Chancellor, decreed an appointment made by her a good execution of the power^c; for the general agreement and intention of the parties, as expressed in the articles, was as strong as an actual conveyance in equity, and amounted to a direction to the trustees to stand seised of the premises to the uses of her appointment.

Infants.

So again, a power may be given to and exercised by an infant^d.

But with respect to *infants*, a distinction is taken between the execution of powers simply collateral, and those where there is an interest; for though an infant may do a ministerial act, where he is a mere instrument or conduit-pipe, and his interest be not concerned; yet a power over his own inheritance cannot be executed by him, for reasons adduced in a former page, unless the power be expressly given to him to be executed, *notwithstanding infancy*. Therefore, in the case of *Herle v. Greenbank*^e, Lord Hardwicke

^c *Wright v. Lord Cadogan*,
Ambl. 468; 6 Bro. Ca. Par.
156.

^d 2 P. Wms. 229, 671.
^e 1 Ves. 298; S. C. Atk.
696.

said, that he could find no case, where a power given generally, could be executed by an infant; and therefore he would make none. As to the general question concerning powers, it must be admitted there were some kind of powers which an infant might execute; as where he was a mere instrument or conduit-pipe, where no prudence or discretion was required, or where his right was not affected. It was indeed pretty much undetermined how far infants could be attornies, unless to deliver seisin, or such ministerial act; but that was different from these kind of powers. These powers over real estates were introduced by the statute of uses; for, before that statute, they were done by way of condition; and as before that statute a man might exercise a power over an use, so he might still. At common law an infant might have performed a condition which was for his benefit; so he might make a feoffment for his benefit; as, if he had an estate, upon condition to make a feoffment of part of it to *I. S.* or else to lose the whole estate: but as to the other kind of powers to be executed by infants, he found no authority for it: an infant might undoubtedly present to a church, but he could not execute this power; in like manner, he might present by guardian, if only a month old; and the strong ground of that was, that there was no inconvenience, because the bishop was to judge of the clerk's ability. The instances of fine and recovery were to be laid out of the case, the law allowing infants to declare the uses upon these for want of remedy; for in the case of an infant's fine during non-age, if error was brought, and tried by inspection, it might be reversed; but, if not reversed, the fine stood: and if the fine stood, the declaration of the uses was the same conveyance, and therefore that would stand; for, on matter of record, he was taken to be a person of full age, and none must be admitted to aver the contrary. No argument could be drawn from custom,

* 1 Inst. 52, a. 128, a.

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custom differing from private powers given in general: custom was *lex loci*, and was always presumed to have a reasonable commencement: and such a custom, that an infant at fifteen might make a feoffment, was the same, as if a private act of parliament had been made to give infants such a power. The case put by *Moore*^a, that an infant having power to make a feoffment by custom, and making a feoffment to the uses of his will, though void as a will, because of infancy, should serve as a declaration of the use of the feoffment, his Lordship admitted had a semblance to the execution of a power, but it was put only *arguendo* at the bar; no case was cited for it, nor could he find any authority to support it, the cases being rather to the contrary¹; for they said, that if an infant made a feoffment of gavelkind lands warranted by the custom, and it was to his own use, if he made a will of the use, it was void; unless the custom would warrant it, the devise was not good, for the custom must be taken strictly. And, in his apprehension, this differed little from the case put by *Moore*; for, before the statute of uses, one might devise the use, and the will would have been a good direction of the use. If so, then one who had a feoffment to his own use might devise it; yet, according to the case in *Rolle*, the use there could not be devised by will; which was a direct contradiction to the case put by *Moore*, *arguendo*; and therefore he took that case not to be law. It was said that a feme covert might execute a power, (which was so determined in *Rich v. Beaumont*^k, upon the execution of a power created before she was covert, and also in a case before Lord King;) so a power to a feme covert to make leases was good, and therefore why not *this* to an infant of the age of discretion. He took it, that, in law, the dis-

^a *Buckhart's case*, *Moore*,^j 2 Rol. Abr. 779.

512.

^k 3 Bro. Par. Ca. 308.¹ See 21 E. 4, b; Bro.

Cust. pl. 50; 2 Rol. Ab. 779.

ability of an infant with respect to his real estate was more favoured, and a stronger disability than that of feme covert. In *Hobart*¹, there were some cases put, and there was a marginal note very material, (and the notes in *Hobart* were allowed to be his own,) where it was said, that "coverture was not, at common law, so far protected as infancy, and some other disabilities, as non sane memory, &c." the ground of the disability being, not from want of judgment, but from being under the power of the husband; she having as much judgment as if discover: this was the reason why she was examined upon suffering a recovery. But, no examination of an infant would make his recovery good, his disability arising from want of judgment. His lordship also mentioned the cases of a woman disseisee marrying, and the disseisor dying seised; this would take away her entry after her husband's death, (unless, indeed, she was within age at the time of her marriage, for, then, no folly could be accounted in her in taking such husband as would not enter before the descent,) which shewed, that the disability of an infant arose from want of judgment. In *Mary Portington's case*², a common recovery against husband and wife was held good; but not so against an infant, who had not such a disposing power of the land as they had, but was *tout ousterment* disabled, by law, to convey or transfer his inheritance or freehold during minority: but she was said here to be of as much discretion, as if she had lived two years longer, and it was urged that the court would judge of the infant's personal discretion³: this would be introductive of the utmost inconvenience, and a power with which he should be very sorry to be trusted: there was a variety of opinions with respect to persons ability and judgment; and, in these cases, neither of them could be known until after the death of the party. The words of *Hubbard*⁴, as to a

¹ Rep. 95.² 10 Co. 43, a.³ 1 Inst. 246, 403.⁴ 225.

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feoffment of an infant by custom, were material, viz. that, in pleading, an age certain must be set down, and not left to the measuring a yard of cloth, &c. These general cases determined him in his opinion, that this execution could not be good. Private acts of parliament had been made to enable infants to execute powers, as in *Sir Thomas Perkin's* case. The only case his Lordship could find of a power executed by an infant, was *Lord Kilmerly v. D. Gery*, (generally cited for another purpose[†]). But upon consulting the decree in that case, he found that the power then executed was by virtue of a private act of parliament, in which act there was an express clause to make good all acts to be done by the infant; which were decreed, notwithstanding his minority, to be as valid and effectual, as if at the time of making them he had been of full age; so that that case was the case of a power clearly arising from an act of parliament; and gave no colour of an authority for a general power. Taking it, therefore, in general, his Lordship declared himself to be of opinion, that an infant could not execute a power. This was, moreover, his Lordship observed, a power coupled with an interest, which was always considered different from naked powers. It was admitted that if this execution was to operate on the estate of the infant, it might not be good; now it was clearly to do so; for she had the trust in equity for life, with the trust of the inheritance in her in the mean time, which, if not disposed of, would remain in herself, and descend to her daughter; so that this was directly a power over her own inheritance, which could not be executed by an infant. But, as to the personal estate, which was likewise given to the separate use of the daughter, it was said in the last case, to be a rule of the court, that a feme covert might dispose of that, and that being clear of the objection made as to the real estate;

[†] Cited in *Evelyn v. Evelyn*, 2 P.Wms. 659.

because she was above the age of seventeen, at which age, if sole, she might have disposed of it by will¹.

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But a person *non compos* cannot execute a power of any kind, for he has no volition. Non compos.

A power of appointment given to one person cannot be exercised by another to whom he may have delegated it; because it is a maxim, that *delegatus non potest delegare*². Where, therefore, a personal estate was given to such uses as *B.* should appoint; a direction by *B.* that the money should be applied as his brother should appoint, was disallowed³. Agent.

But if a power be expressly reserved to be executed by one and his assigns, in such case an execution by an assignee will be good, and a devisee or executors and their assigns will be assignees within the power⁴. The court, in the case referred to below, said, that assignees might include assignees in law, as well as fact; and that a devisee was an assignee, and a power, being *in fieri*, must go to executors, and, by the same reason, to their assignee.

III. TO WHOM AN APPOINTMENT MAY BE MADE.

UPON this head it may be observed, that not only all persons who may take under a common law conveyance, may take by appointment under a power, but a feme covert, in one instance, may take under an appointment when she could not take by a common law conveyance; for a feme covert may, by appointment, take from a husband, although we have seen that husband and wife being considered in law as but one person, he cannot convey to her⁵, by an act *in pais*; and this difference arises from the nature of powers in appointment before adverted to;

¹ 1 Ves. 303.

² *Ingram v. Ingram*, 2 Atk. 38.

³ *Attorney Gen. v. Berryman*, cited 2 Ves. 645.

⁴ *How v. Whitfield*, 1 Vent. 338, 339; Sir. T. Jones, 110, S. C.; 2 Show. 57.

⁵ Co. Lit. 3, a, n. (1).

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i. e. that the appointee does not take from the appointor or the deed of appointment, but from the person and deed giving the power to appoint.

**IV. OF THE EXECUTION OF POWERS; OR THE FORM
AND CIRCUMSTANCES REQUISITE TO THE VALI-
DITY OF AN APPOINTMENT UNDER A POWER.**

As the owner of an estate has an absolute dominion over his property, he may guard against any disposition of it by surprise, or accident, by imposing upon himself or others, to whom he may delegate such power of disposition, any form or ceremonies (consistent with the rules of law) to accompany the exercise or execution of it, which he may think proper^w. Formerly, many trifling circumstances, as the tender of a ring, or the like^x, were usual for this purpose; but since assurances affecting land were, by the statute of frauds, required to be in writing, the conditions generally imposed upon the execution of powers have been, that it shall be by some instrument in writing, sealed and delivered by the party, in the presence of a certain number of witnesses.

I shall, therefore, consider,

1. The nature of the instrument by which the appointment may be made; and 2, the form and attendant circumstances of such instrument.

1. With respect to the nature of the instrument by which the power is to be executed, it is to be observed, that, unless the kind of instrument is expressly pointed out by the power, it may be done by deed, will or other writing, at the election of the donee, so that such deed, will or writing, be proper for transferring the estate or property which is the subject of the appointment; and therefore a lease and release has been holden to be a good execution of a general power of disposing of lands, without

^w 3 Ca. Ch. 55, 107.

^x Ibid. 53, 127.

restriction to any particular form of conveyance^r; "for the law does not require any precise conveyance for the execution of a power; a bare direction or appointment being sufficient; and such construction should be made as may be agreeable to the nature of the case (1)."

So also, where a man had power given him to make void or alter uses by "writing under his hand and seal, and by him delivered in the presence of three credible witnesses," and did so, by his will in writing under his hand and seal; it was contended, that the *words* in the deed creating the power, were to be understood of a *deed*; yet it was resolved^s, that, though revocations and appointments must observe the circumstances that the owner imposed upon himself, yet *no more* should be imposed upon him: and, therefore, a power of revocation ought to be taken liberally, and the execution of it favourably construed, according to the nature of property, which was, *that every man should have full power over his own*^t.

And so where, in a marriage settlement, the wife was empowered, by *any writing* under her hand and seal, attested by two or more credible witnesses, (notwithstanding her coverture,) to revoke or alter all or any the uses, &c.

^r *Dighton v. Tomlinson*, Com. 194; S. C. Salk. 239; 1 P. Wms. 149; *Anon.* 3 Leon. 71.

^s *Kebbett v. Lee*, Hob. 312; and see *Hubbard's case*, cited Lit. Rep. 218.

^t See *Burnett v. Mann*, 1 Ves. 157; *Earl of Darlington v. Earl Pulteney*, Cowp. 260; *Cavan v. Pulteney*, 6 Bro. Par. Ca. 175, S. C. and note distinction.

(1) A question arose in the above case as to the construction of the word "*then*," and it was said, that the adverbs "*when*" and "*then*," in case of limitation of estates, do not make any thing necessary to precede the settling of them, any more than when one lets land for life, and *after* lessee's death, "*then*" the remainder to J. S., in which case the remainder vests presently, and so adjudged in *Boraston's case*, 3 Co. 19; and see *Kebbett v. Lee*; Hob. 312.

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and, "by *the same*," or "*any other deed*," to grant and appoint the same premises in such manner as she should think fit, she by her *will in writing*, (or *writing in the nature of a will*) under her hand and seal, attested by three credible witnesses, without taking notice of the settlement, devised all her estates which descended to her, and in which she, or her husband in her right, or any other person in trust for her, then had any estate, subject as therein mentioned, to her husband and his heirs; and it was held, that, being enabled by *any writing* under her hand and seal, attested, &c. to revoke and change all the former uses; and, by *the same "writing,"* or "*any other deed*," to appoint new uses; her will, (or the writing in nature of her will,) was a good execution of this power of revocation and appointment; for it was *a writing* under her hand and seal, attested by three credible witnesses; and *substantially* as well as *literally* answered the description, and comprised all the requisites of the power.

And though such power, reserved to be executed by *a writing*, be executed by *several* assurances, as by deed and fine, yet if they have in their natures such a relation to each other, as that they can be considered *as making together one entire conveyance*, it will be a good execution of the power^b.

But, if the particular kind of instrument by which the appointment is to be made be expressly mentioned, it cannot be made by any other conveyance^c. Thus, where *William Earl of Bath*, and *William Pulteney*, suffered a recovery, and declared the uses to be to such persons, &c. as they, by any "*deed*" or "*deeds*," (either with or without power of revocation), to be sealed and delivered in the presence of two or more credible witnesses, should, from time to time, jointly, or the survivor of them alone grant,

^b *Earl of Leicester's case*, of *Wiggon v. Garrett*; and see 1 Vent. 278; S.C. Raym. 239, 4 Mod. 265; 1 P. Wms. 169. and 2 Lev. 149, by the name ^c 10 Co. 144, a.

direct, limit or appoint⁴; it was held, that this power was not *duly* executed by the will of the Earl of Bath; for there were, in this case, no words to lay hold of, upon the construction of which the execution of the power could be supported; for it was "*emphatically*" reserved to be executed by "*deed*." Now the word *deed*, in the understanding of law, had a *technical* signification, to which a will was in no respect applicable. If any words had been thrown in, such as *writing, instrument, or other term* of a general comprehensive meaning, it might have been fair to have taken advantage of it in favour of the intention. But *here* were no such general words; and the intention of the person who created the power could not properly be fulfilled, unless the *form* was *strictly* pursued.

So where the execution of a power of revocation and appointment is directed to be by deed indented and enrolled, or a deed to be enrolled in a particular court, that requisite must be complied with, in order to give effect to the appointment*.

But when a power is given to appoint uses of land, or of personal estate *generally*, or by *will*, or by deed *expressly*, without *prescribing* the manner in which either of them is to be executed; the instrument is intended *in law* to be such an one, as, in the utmost strictness, is proper for the disposition of that which is the *subject matter* of the appointment^f. Consequently, if the subject of the power be *land*, and it be to be executed by *will*, the will must pursue the form required by the statute of frauds. But, if the subject of the power be *personal property*, it may be executed by a testament in the ordinary form^g, unless in cases where no interest passes from the *donee* of a power directed to be executed by *will*, but the will merely *apportions* an

⁴ *Earl of Darlington v. Pulteney*, Cowper, 260.

^e *Digger's case*, 1 Co. 173; *Hawkins v. Kemp*, 3 East, 410.

^f *Longford v. Eyre*, 1 P. Wms. 740; and see *Wagstaff v. Wagstaff*, 2 P. Wms. 258.

^g *Duff v. Dalzell*, 1 Bro. Ch. Rep. 147.

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interest created and given by a previous instrument; for in such case, as the appointor is not the person who *makes the charge or affects the estate*, it is not necessary that *such* will should be conformable to the statute of frauds, although the subject of the appointment be land.

And a power of appointment to be executed by a will, attested by two witnesses, will be well made, by a will so attested, although it be of lands, because the appointment does not derive its effect from the statute of wills, but by the deed creating the power².

But, if the instrument for executing a power be *expressly* required to be attested by *two* witnesses; a will not so executed will be invalid, though the property may be personal, and although that form is not requisite to a testament of personal estate; for the instrument, in such case, must comply with the requisitions imposed by the donor of the power³. And, upon the same principle, if the creator of a power direct it to be executed by a writing testified by *two* witnesses only, an instrument so executed, *though purporting to be a will*, will be valid, in law, to carry that which is the subject of the power, *although it be land*⁴.

And if a power be executed by will, such will, it should seem, must be regularly proved as such before it can be made use of, either at law or in equity, as an execution of the power: for where a *feme covert*, having a power to appoint personal estate by will executed in the presence of two witnesses, had left a testamentary paper not so testified, by which she disposed of a part of the property subject to the power, Lord Chancellor *Hardwicke* objected, that this was *no will*, because it had not been proved in the ecclesiastical court: which was attempted to be answered, by urging that it was *only a writing of a feme covert* executing a power, and not *strictly a will*, the husband not consent-

² Fearn. Ca. and Op. 432.

³ See *Ross v. Ever*, 3 Atk. 156; and see *Thurston v. Att. Gen.* 1 Vern. 340.

⁴ *Dey v. Thwaites*, cited 3 Ch. Ca. 69, reported 2 Vern. 80; but this point was not made there.

ing to it; so that it could not be a will, neither could it be proved in the ecclesiastical court; but was only a power which would take its operation from the original deed by which it was created: his lordship, however, was of opinion, that, though, in the notion of law, a wife could not make a will, yet, when a feme covert had a separate power over her estate, and might dispose of it by will, whatever sort of writing she left, it ought first to be propounded as a will in the spiritual court².

And an instrument, made in execution of a power, retains all its essential properties and qualities, and is, in law, considered as liable to all collateral circumstances, in like manner as it would have been, if made with any other view¹. And therefore, in the case of a will made in execution of a power, although it does not derive its effect from the statute of wills, but from the deed creating the power, and operates as an instrument of appointment of uses previously created, and not as a devise of the land²; yet it is to be construed in the same manner as if it were a proper will³, to prevent the confusion there would be, if a testamentary disposition were to be construed sometimes in one way, and sometimes in another. It follows, therefore, that a will, in execution of such power, (supposing it to be of lands), would be alterable or revocable, according to the statute of frauds, *by cancellation, &c.*; or, according to law, by any of those methods which would effect the same, in case of a strict or proper devise⁴ (1).

² *Ross v. Ewer*, 3 Atk. 156.

² 1 Ves. 139; 2 Ibid. 77.

¹ *Hatcher v. Curtis et al.*

² 2 Ves. 212.

³ *Freem.* 61; *S. C.* 2 Eq. Ca.

⁴ See *Cotter v. Laver*, 3

Abr. 671, 673; *et per Lord*

P. Wms. 623.

Hardw. 1 Ves. 139; 2 Ves. 77.

(1) Vide *Lisle v. Lisle*, 1 Bro. Chan. Rep. 533; *Lawrence v. Wallis*, 2 Ib. 319; also *Cotter v. Laver*, 2 P. Wms. 623; *Rich v. Beaumont*, 3 Bro. Par. Ca. 308; in which a power given to an unmarried woman to dispose of her
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And hence, also, a will made in the execution of a power, is revocable, without any power reserved for that purpose^p; which, as we have before seen, is necessary, in order to authorize a revocation of an appointment by deed.

So, if the *appointee*, under a power executed *by will*, die *before* the *appointor*, all interest which he would have taken under such will, had he survived, will lapse^q; for, although the interest of the appointee arises out of the power to make a will, and the general notion of law, as to a power, is, that any one, taking under the directions of a will made in the execution of a power, takes under the power in the same manner as if his name were inserted in it; yet they must take according to the nature of the power and instrument taken together; therefore, if a power be executed by will, it must be construed to all intents like a will; of the essence of which species of conveyance it is, to be ambulatory, revocable, and incomplete, until the death of the maker of it; nor can any one, dying in the testator's life, take under it. Therefore, a person appointing by will, from the nature of the instrument he uses (which every one is supposed to know), does the same as if he *particularly* expressed that the appointment should only take effect in case the appointee survived. Thus, where a feme covert, by virtue of the power reserved to her on her marriage, made her will, and appointed a sum of money to her nephew, who died in her life-time, Lord Hardwicke held, that the appointment was void by his death, in the nature of a lapsed legacy, and nothing passed to his representative^r.

^p *Lawrence v. Wallis*, 2 Bro. Rep. 319. 2 Ves. 65; and see *Duke of Marlborough v. Lord Godolphin*, Ibid. 61; and *Southby*

^q 1 Ves. 135; 2 Ibid. 612.

^r *Oke v. Heath*, 1 Ves. 135; *Maddison v. Andrew*, v. *Stonehouse*, Ibid. 612.

estates by will, was held to be suspended by her subsequent marriage; but the Lords reversed the decree, upon appeal, and referred the matter to the opinion of the Judges.

So if an appointment by will be made to the heir at law of the testator, for the same estate as he would have taken by descent, he will so take, in like manner as if the estate were devised to him by a proper will, and not take by purchase*.

And as, in case of the execution of a power directed to be executed by will, all incidents and contingencies affecting a will attach upon it; so also, if the appointment be made by deed, such deed will likewise operate precisely in the same manner when made in execution of a power, as when used for any other purpose. Thus, where lands were conveyed to trustees, for such uses as E. should appoint; who voluntarily, by writing under her hand and seal, limited the uses to H. and afterwards destroyed this deed, and limited the uses to others, without there being any power of revocation reserved in the first deed, it was held that she was bound by the first limitation, and it was not in her power to alter it; for, where the power is once executed by deed, and no power is reserved to revoke or alter it, a subsequent limitation by another deed is void†. So if a power were reserved to limit a trust by deed or will, and it were once limited by deed, it could never afterwards be altered: for trusts were governed by the rules of law, though the execution of them were only compellable in a court of equity. But if the limitation were by will, which in its own nature is revocable, it might be revoked or altered as the party pleased.

But in *Langley v. Brown*‡, Lord Hardwicke suggested, that a distinction might be taken where there are two powers, viz. a power to appoint uses, and a power to revoke uses; in which case his lordship inclined to think that they might both be executed at once, as they should seem to be distinct and separate powers. And so also the

* *Hurst v. Winchelsea*, 1 Blac. Rep. 187.

† *Hutcher v. Curtis et al.* Freem. 61.

‡ 2 Atk 201.

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rule admits of an exception, where the person in whose favour the power is created takes under it in respect of a *particular character*; (as in the character of a younger child); and by collateral events, as the death of the elder, he loses that *character*; for as he thereby ceases to have a *capacity of taking* under the appointment, the appointment is, as it were, lapsed, and the appointor may make a new appointment, in favour of those who succeed to the characters sustained by the first appointee*, which seems to be a reasonable construction, made to answer the intent of the parties, and to avoid inconveniencies and absurdities, and, agreeably to the general grounds of the court, in construing the words "younger children," which have received a very great latitude of construction to answer the occasions of families and the intent of the parties; an eldest daughter having often been construed to be a younger child, when a provision was made for younger children, and there was no other provision for a daughter, but the estate limited to go over; and a younger son becoming an eldest, has, under certain circumstances, been considered as an eldest, to exclude him from the benefit of the portion; and Lord Harcourt, in *Beal v. Beal*, laid it down as a rule, that younger children should be considered to be such as "did not take the estate, and were not the head and representative of the family." Lord Cowper, therefore, in analogy to these constructions, inferred, that the continuing of T. in the capacity or character of a younger son to the time of the provision taking effect in point of payment, was a tacit or implied condition annexed to the appointment†. And the determination of Lord Cowper, in this case, was afterwards approved by Lord Talbot in the case of *Jermyn v. Fellows*‡, and by Lord Hardwicke in *Lord Teynham v. Webb*§, where his

* And see *Chaddick v. Doleman*, 2 Vern. 528; *Lord Hele v. Bond*, Prec. Ch. 474.
† *Teynham v. Webb*; 2 Ves. 212.
‡ Rep. temp. Talb. 93.
§ 2 Ves. 198, 212.

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lordship carried the same principles to a direction under a power for provision for younger children, in default of appointment; his lordship holding, that there could be no difference between the one and the other, the objects being the same.

A power of appointment may also be executed at different times, over different parts of the premises subjected to the power, and it is highly reasonable that it should be so; for there may be many cogent reasons to render it convenient; as children being more or less numerous, a wife's additional fortune, or her good behaviour and merit, or many other circumstances of a family. And what is such a power but a mode of conveyance, putting the tenant for life, *quoad hoc*, into the same condition as if he was tenant in fee? So in the case of *Bovey v. Smith*^a, the court said, that where a man has a power of appointing a fee, he might execute it at several times, and appoint an estate for life at one time, and a fee at another^b.

Powers of appointment may be executed at different times.

2. Having considered the species of instrument by which an appointment may be made, we should now inquire concerning the form and circumstances requisite to give validity to such instrument; as to which it is to be remarked, that too rigid an adherence to the form prescribed by the power cannot be observed^c; but yet it is not necessary that the words, or even the form of the power, should be used, so that the material circumstances of the power be pursued, and the party appears to have had the subject of the power in contemplation.

Of the form and circumstances requisite to an appointment.

Nor is it necessary that any reference should be made to the power, if it clearly appear that the party intended to execute it; and it has been always considered as sufficient evidence of such intention, if he do that act which the

^a 1 Vern. 85.

67; *Zouch v. Woolston*, 2

^b And see *Herring v. Burr*, 1136; 1 Blac. Rep.

Brown, 2 Show. 185; 1 Vent. 281; *Doe v. Milborne*, 2 Fit.

368; Dougl. 45; *Digges's* 721, S. P.

case, 173; *Lee's case*, 1 And. ^c 10 Co. 144, a.

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power authorizes him to do, but which he could not do but by virtue of the power^d.

Thus where tenant for life, with remainder over in strict settlement, having a general power of revocation and new appointment, conveys to a purchaser by lease and release, bargain and sale, or feoffment, without noticing his power, this, if the formalities prescribed by the power are pursued, will be a valid and substantial (though an informal) execution of the power; for, as the party cannot vest the fee in the purchaser but by virtue of this power, it is sufficiently evident that the act was intended to be in execution of such power^e.

But although a man may execute a power of appointment, without particularly reciting or referring to the deed creating the power, yet the *instrument* by which the power is executed must have reference, *on the face of it*, to, or *mention*, the *estate* on which it is to operate^f: for according to the rule laid down in *Sir Edward Clere's case*^g, (which is the true rule), where one having a power to appoint by will makes a will, without any reference to the power, the appointment shall have no effect, unless the will would otherwise have no operation.

And the circumstance of there being no assets to feed

^d *Probert v. Morgan*, 1 Atk. 441, 559; See *Clere's case*, 6 Co. 17; Cro. Eliz. 877; Cro. Jac. 31; *Maddison v. Andrew*, 1 F. Ves. 58; 2 Bro. Ch. Ca. 308; Hob. 160; Co. Lit. 271, b, (note); *Buckland v. Barton*, 2 Hen. Black. 136; *Andrews v. Emmett*, 2 Bro. Ch. Ca. 297; *Standen v. Standen*, 2 F. Ves. 589; 3 Ibid. 469; *Scrope's case*, 10 Co. 143; *Guy v. Dormer*, T. Raym. 293; *Degg v. Degg*, 2 P. Wms. 414.

^e Ibid

^f *Probert v. Morgan*, 1 Atk. 441; *Moulton v. Hutchinson*, 1 Atk. 559, 659; S. C. 2 Eq. Ca. Abr. n. (a); *et vide Ex parte Caswell*, 1 Atk. 559; *Poulson v. Wellington*, 2 P. Wms. 533; *Langham v. Nenny*, 3 Ves. jun. 468; *Hales v. Magerum*, Ibid. 299; *Croft v. Slee*, 4 Ibid. 60; Co. Lit. 271, b, notes; and see *Buckland v. Barton*, 2 Hen. Blackstone, 136.

^g 6 Co. 17, b.

a residuary disposition, or even to pay general legacies, without construing the will to be an execution of the power, is not deemed a sufficient circumstance to take the case out of the rule, where there is no disposition particularly applicable to the subject of the power, and the expressions of the devise be equally applicable to the other properties of the testator^h.

If, however, the estate over which the testator has a power of appointment, be referred to in terms which include it with the other property of the testator, it seems to be sufficient to subject it to this power, although it be not particularly set forth; for if a man has power to charge an estate, it is not necessary, in the execution of it, that he should refer to the deed out of which the power arises; for, in a court of equity, it is enough that his intent appear; and if, in the execution, he sufficiently describe the estates he has a power to charge, the estate will be bound, *especially where the person charging is a purchaser of the power*ⁱ.

But if a person seised of an estate, convey it to another, in such a manner as that an estate or interest either still continues in, or results to himself by force of the conveyance, or vests in another until an appointment be made of it conformably to the power; and he execute a conveyance of the estate, or an interest out of it, which may take effect, *either out of the legal estate which remained in, or resulted to him, or by virtue of the power indifferently; and if the deed, creating the power, is not recited or referred to*, the instrument will operate upon his *interest* and *not* upon his *power*. Thus in *Sir Edward Clere's* case, before referred to, it was determined, that where a man, seised of lands in fee, made a feoffment to the use of such person

^h *Andrews v. Emmett*, 2 *Clifford*, 1 Atk. 441, 559; Bro. Rep. Cha. 297; and see 6 Co. 17, 18; *Standen v. Standen*, 2 Ves. jun. 589; 3 *Ibid.* 469. and see 6 Co. 17, 18; *Standen v. Standen*, 2 Ves. jun. 589; and 3 *Ibid.* 469.

ⁱ *Probert v. Morgan and*

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and persons, and of such estate and estates, as he should appoint by his will, the use, by operation of law, vested in the feoffor, and he was seised of a qualified fee, that is to say, *a fee subject to be defeated by declaration and limitation made according to his power*. And, that if, in such case, the feoffor, by his will, limited estates "*according to his power reserved to him on the feoffment*," there the estate should take effect by force of the feoffment, and the use be directed by the will; so that, in such case, the will was but declaratory: but if the feoffor devise the land itself, as owner of the land, without any reference to his authority, there it should pass by the will; for the testator having a devisable estate in him, and also a power to limit an use, and he had an election to pursue which of them he chose; and when he devised the land itself without any reference to his power, he declared his intent to devise an estate by his will, as owner of the land; and not to limit an use, according to his authority*.

And whether the estate remaining in or resulting to the owner of the land be a legal or only an equitable or trust estate, it will be the same¹; for a trust estate is, in equity, to be considered and construed in the same manner as a legal estate is at law.

And so if, upon view of the instrument by which the power is contended to have been executed, the intention stands in equilibrio, as if it be so framed, that whether it be determined to be a good execution of his power, or not, yet the deed by which the power was executed must be in part invalid; the limitation, it seems, will take effect out of the interest of the donee of the power, and not out of the power²; for the law will construe it as the act

* 6 Co. 17, b; *et vide sup.*; Lit. 109, a; and see *King v. Mellish*, 1 Vent. 225, as to this point.

¹ *Ex parte Caswell*, 1 Atk. Rep. 559.

² See *Brown v. Taylor*, Cro. Car. 38; Pow. Pow. 123; *Sir Ed. Clere's case*, 4th resol.

of one who is owner and may dispose of it as such, and not as a declaration of the uses, which is an authority only; and to construe it as a deed for one part, and as an authority for another part, is contrary to law.

And where the power is to enable the donee to charge an estate with a certain sum, the rule of law is the same; namely, if the charge may possibly take effect out of the interest of the donee of the power in the estate charged, it shall do so; even though such interest of the person, having both a power and legal estate, may eventually prove insufficient to answer the charge he makes upon it^a.

And, if a man having both an interest in an estate, and a power to charge it by appointment, and execute the power by a will which cannot take effect as an appointment, by reason of a subsequent extinguishment of the power, the appointment shall be sustained as a charge upon the interest which the appointee had beyond the power^b. For, *per* Thurlow, Chancellor, though the power is gone, and the act done purports to be an execution of his power, yet, where the evident intent is that the charge should take place on the estate at all events, it must be sustained out of the interest he had at the time of his death.

So also all other incidental circumstances prescribed in the power, as the consent of third persons, the form of executing the instrument of appointment, subscription of witnesses, and the like, must be strictly observed^c. Thus, where a testator devised his estate to such uses as his wife, with the consent of his trustees, should appoint, and she made a will thereof without such consent, this was held to be no appointment; and the original testator was considered as dying intestate as to so much of his property as was so devised^d.

^a *Jenkins v. Keymis*, Hard. 395; 1 Ca. Ch. 103; but most accurately reported, 1 Lev. 150. ^b See *Scrope's case*, 1 Co. 144; *Hibbett v. Lee*, Hob. 312.

^c *Sympton v. Hornsby*, Prec. Ch. 452. ^d *Cross v. Hudson*, 3 Bro. Rep. Chan. 31.

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So, where estates were, on the marriage of *F.* with *M.* conveyed and settled to certain uses therein particularly mentioned, with a power to *F.* by his last will, or any writing purporting to be his last will, under his hand and seal, attested by three or more credible witnesses, to charge the premises with any sum or sums, not exceeding 2,000*l.* to be paid to such persons, and in such portions, as he should appoint. *F.* by his will in writing under his hand attested by three witnesses, but not sealed, reciting his power of charging the premises with the 2,000*l.* disposed of the same to *D.* and others (being his relations) in the proportions therein mentioned. And the Judges of the King's Bench, on a reference from Chancery, determined, on argument, that the will was void, as a charge, for want of being sealed.

So, where a power of revocation was reserved to be executed by being attested by six witnesses, and the execution was by will executed in the presence of three witnesses only, it was determined not to be a good execution.

The fettering and circumscribing powers of this kind arises from jealousies on both sides; first, on the side of the next of kin, that the party may not be influenced to do some act to dispose of the property so as would prevent their having the benefit of it; secondly, other persons, as a husband, may apprehend that there may be some undue methods used to surprise the wife into an act which might deprive him of the advantage he expected from her fortune. And, although there is no instrument that requires so little ceremony as a will where of personal estate, yet, to reject any part of the power, provided as a necessary caution, in order to prevent a disposition by surprise or undue means, is what the court will not warrant.

¹ *Dormer v. Thurland*, 2 P. Wms. 506; and see Pow. 141.

² *Bath and Montague's Ca.* 3 Ch. Ca. 55; 2 Freem. 193

³ *Ross v. Ewer*, 3 Atk. 156; and see *Spranger v. Barnard*, 3 Bro. Ch. Rep. 585.

And the rule is the same, although the power of appointment be reserved to be executed by the owner of the estate himself; for when a man has restrained himself by a particular power, he has no right to dispose of his estate but by exactly pursuing that power^a. In the consideration of these cases, the question not being, whether the instrument, by which the power is executed, be in itself sufficient, as an independent conveyance, to carry the estate or interest which is the subject matter on which the power is to operate; but, whether it be that instrument which the author of the power, (who, as owner of the estate, had a right to annex any forms that he pleased, however arbitrary, to the execution of it), meant and intended in the creation of it. For, if it be not that instrument which he required, the claimant under the power can have no title, unless he shows some equitable ground upon which these circumstances ought to be dispensed with; since, if the power does not take effect, and the creator of it makes no further disposition of his estate, the claim of the heir at law or personal representative comes in, whose titles are complete, and must, therefore, prevail in this, as in every other case of imperfect assurances. And upon this principle alone is it possible to support many of the decisions, which will next fall under our consideration; namely, those which have been deemed, in Chancery, exceptions to the rule respecting the strict performance of all incidental circumstances; for, we shall find, that in cases where powers respecting lands have been directed to be executed by will, the Court of Chancery have dispensed with that clause of the statute of frauds that requires the attestation of three witnesses; and have held a will, in execution of a power, good, although it hath only been attested by two witnesses. Now as there is no position of law more clear and decided, than that the Court of Chancery cannot, in any case, however favourably circum-

^a *Bath v. Montague*, 3 Ch. *Albemarle v. E. of Bath*, 2 Ca. 107; and see *Duchess of Freem.* 193; 3 Cha. Ca. 55.

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stanced, support a will to which the attestation of three witnesses is required by that statute, unless that form be complied with; the only ground upon which the court can exercise an equitable jurisdiction to dispense with that circumstance is, by considering a will, under such predicament, not to be strictly a will, but to be a distinct kind of instrument, in nature of a will, made in execution of a power. And this mode of considering such a will is not inconsistent with the rule we have mentioned before; namely, "that where a power is directed to be executed by a will, it shall be presumed that such a will is to have all the requisites necessary to the constitution of a regular will, according to the nature of the property it is to operate upon, and to be liable to all the contingencies to which a strictly legal will would be subject;" for, that rule was adopted to effectuate the intention of the creator of the power; but, when the court are to look at the instrument when executed, *qua* the execution of a power, they are then not bound to consider the instrument of the donee of the power strictly as a will, which it is not, but as an instrument taking effect out of the deed creating the power, and made in execution of the power; and, in this view, not affected by the statute of frauds*.

Thus, where *T.* made a settlement of lands to the use of himself for life, and afterwards to such child or children, and for such estates, &c. as he should, by any writing under his hand and seal, testified by three credible witnesses, limit and appoint; and afterwards made a will under his hand and seal, but which was executed in the presence of two witnesses only[†]; yet it was decreed to be a good execution of the power; for, though it was not effectual as a will, being void by the statute of frauds, yet it was a writing which had all the circumstances required by the power, and should therefore be good as a declaration of trust and an execution of the power.

* See Pow. Pow. 147, 153;
Sugd. Pow. 201.

[†] *Dey v. Thwaites*, cited
3 Ch. Ca. 69; S.C. 2 Vern. 80.

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Where a strict
observance of
circumstances
dispensed with.

In some cases, however, the Court of Chancery does not consider itself restrained to an observance of the same rule by which the courts of law are bound, with respect to the strict performance of all incidental circumstances required to concur in the execution of a power of appointment. These cases are those in which that court regard the end and consideration of the appointment, rather than the strict legal requisites prescribed by the terms of the power to accompany it; in which cases the court will relieve against the non-observance of circumstances of mere form^{*}. But the principal grounds on which courts of equity interpose in these cases, are those in which the omission of circumstances has been occasioned by fraud or accident, or, where there is a trust on the one side, and a consideration or confidence on the other; for in contemplation of equity, every person executing an instrument to convey property for a consideration, or undertaking a trust or confidence, is under a moral obligation to make a perfect and complete transfer of that for which the consideration was given, or with respect to which the trust was reposed in him. And the highest considerations in contemplation of courts of equity are those of an actual purchase for money, and those of marriage. In favour of these, therefore, the most liberal construction will be put upon the execution of a power. And a creditor being also considered in equity as a purchaser for a valuable consideration, the most liberal interpretation is admitted for his benefit. Thus, where *G.* having a power to make a lease of her estate for twenty-one years in possession, made a lease to *C.* for twenty-one years to commence at a future time, as a security for a debt^{*}; the court held, that though the lease was not good in strictness of law, because not made conformably to the power, yet, that it amounted

^{*} See Pow. Pow. 155; ^{*} *Pollard v. Greenville*, 1 Sugd. Pow. 212, 371; and Cha. Ca. 10.
Burnet v. Holgrave, 2 Ves. 642.

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in equity to a good appointment of the lease for twenty-one years ; and that the receipt of the profits was under that power, and subject to the trust of the lease.

Children are also, in equity, considered as in the nature of creditors, claiming a debt founded upon a moral obligation in the parent to provide for them, this being, in equity, a good consideration upon which a debt may be contracted. In favour of all these, therefore, a court of equity will also dispense with the form of the instrument, in all cases where the donee of the power makes such a conveyance as to warrant the court in concluding that he intended to execute the power. For, although, where the question arises between the original donee of the power, or his appointee without consideration, (whose claim can be no better than his under whom it arises), and the owner, or remainder-man, entitled to the estate in default of an appointment being made under the power, the owner or remainder-man, having a vested interest; will be entitled against such donee or appointee of the power defectively executed, because the owner of the interest under the power, and the owner of the subject out of which it is to arise, being, in these cases, claimants upon an equal footing, no valuable consideration existing upon either side; the possession of the owner or remainder-man gives the best title in law, and there is no equitable ground in the appointee to oppose to it; yet, as between the appointee for a valuable or good consideration, and the owner or remainder-man, the case is different; for, as the circumstances required to attend the execution of a power are imposed solely for the purpose of preventing surprise or fraud upon the donee, and as the nature of the transaction, where the appointment is for a valuable or a good consideration, precludes any supposition of that kind, the act of the donee, by virtue of the consideration upon which it was founded, attaches immediately upon the thing which is the subject of the appointment. The title of the owner or remainder-man to the

interest vested in the appointee being, therefore, merely as a volunteer, and without consideration, and the title of the appointee being as a purchaser, and upon consideration, a moral right arises in favour of the appointee, upon which the courts of equity found a trust that binds the thing which is the subject of the power, in whose hands soever it comes. Hence the court, in this case, does not consider the form of the conveyance, but takes it according to the intent; for, in equity, the consideration is the substantial part of every contract, whether civil or moral; and for that the right is transferred, and what ought to be done is looked upon as done; and, upon these grounds, relieves against the imperfect execution of the power^b.

And, upon this principle, a covenant in a marriage settlement has been held a good appointment in favour of a wife, who, in consideration of marriage, is regarded in equity as a purchaser for a valuable consideration. Thus, where T. having a power, under a marriage settlement, to limit any part of an estate for a jointure for any wife he should marry, married and limited 100*l.* per annum out of the estate, and covenanted in the deed, that, in case the value should be deficient, it should be made up out of another estate^c: he being dead, and the estate proving deficient, this defect in the execution of the power was decreed to be supplied, and the deficiency made good out of other estates.

And, where devisees for life had a power, when in possession, by any writing indented, under their hands and seals, to settle any part of the premises, not exceeding 500*l.* per annum, upon any wife which they should respectively marry, for her jointure, and G. being seised of

^b See Pow. Pow. 161; this case disapproved by Sugd. Pow. 342. Lord Chan. King. *Et vide*

^c *Fothergil v. Fothergil*, 2 Freem. 256; and see *Clifford v. Burlington*, 2 Vern. 379; S. C. cited, 2 P. Wms. 229; *sed vide* 2 P. Wms. 668, *Marchioness of Blandford v. Dutches of Marlborough*, 2 Atk. 542, 546; *Alford v. Alford*, 3 P. Wms. 231.

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the estate under the will, by articles, in consideration of an intended marriage, covenanted that he or his heirs would, after the marriage, according to the power given him by his father's will, or otherwise (1) settle, limit and appoint, or cause to be settled, limited or appointed, manors, messuages, &c. of 500 *l.* per annum upon his intended wife for her jointure, to commence in possession immediately after his death if she survived; it was held, upon the principles already mentioned, that the articles referring to the will, were alone sufficient to bind the estate subject to the power, and that they operated as a real charge and lien upon the remainder-man^d (2).

And, although the power be expressly required to be executed by one species of instrument, and it is executed by another, it will in equity be a good execution of the

^d *Countess of Coventry v.* 160; *Strange*, 596; *et vide Earl Coventry*, 2 P. Wms. arguments at large at the 222; S. C. *Gilb. Rep. Eq.* end of Francis's Max. in Eq.

(1) See observations, in this case, on the meaning of the word *otherwise*; where the opinion of the majority of the Judges was, that it was not a mere word of course, but operated as a reservation by the settlor, of a power to settle other lands for his wife's jointure, instead of those subject to the original power, if he thought proper, either independently or in aid of them.

(2) The above cases seem also to fall nearly within the principle laid down in the fourth resolution in *Clere's* case; for in all of them the donee was clearly invested with the power, and able to have executed it properly, and indisputably intended to execute it in favour of the appointee: and the instrument which the court construed as effecting that intent was of the same species as that required by the power, namely, a deed. Then the court went no further than it ordinarily does; it held, that the consideration being paid for the covenant, gave the covenant the effect of an actual conveyance; so that the court only put a construction on the intent of the covenantor, and not on the power, or the instrument of execution, as with relation to the power; for that instrument answered in form the description of the power. And see *Pow. Pow.* 178.

power, in favour of a purchaser for a valuable consideration. Thus, where the husband was tenant for life, with remainder to his first and other sons in tail male, with a power to make a jointure to his wife, "by deed," under his hand and seal; and having a wife for whom he had made no provision, and being in the Isle of Man, by his last will, under his hand and seal, devised part of his lands within his power to his wife for her life^e; this was held to be a good appointment under the power, although being by a revocable instrument, it was not warranted by the terms of the power, which directed that it should be by deed; for, *per curiam*, this is a provision for a wife who had none before, and is within the same reason as a provision for a child not before provided for.

And though the appointor be at the time an infant, and incapable at law of performing any legal act, yet the appointment will be good in equity. Thus, where *M.* devised lands to the use of himself in tail, with remainders over^f; with a power to the several tenants for life, when in possession, to make a jointure, so as such jointure did not exceed a moiety of the estate; during the infancy of one of the tenants in tail, upon a treaty for his marriage, his mother and he covenanted with the wife's relations, that within six months after he came of age he should settle so much of land as should amount to 100*l.* per annum upon his then intended wife for her life; this covenant was decreed in equity to be a good appointment in execution of the power.

And such covenant will be equally a good execution of a power made in favour of children, as if made in favour of a wife^g (1).

^e *Tollett v. Tollett*, 2 P. head, cited 2 Will. 229.
^f *Wms.* 489. ^g *Sarth v. Bianfrey*, Gilb. Rep. Eq. 166.
^h *Hollingshead v. Hollings-*

(1) It seems to be necessary, however, that such covenant should be united with the deed executing the power, either by referring to, or reciting, or mentioning the hereditaments,

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And even an answer in Chancery, when given in express relation to the power, has been holden to be such a manifestation of the execution of a power of appointment as a court of equity would substantiate^h. For Sir Joseph Jekyl, Master of the Rolls, said, where an answer confesses an appointment, this intends to appoint afterwards in due form; and he thought an answer was such a manifestation of the execution of a power, as the court would make good, as well as decree a parol contract, admitted by the answer; for the statute was made to prevent perjury in the evidence; but there was no occasion to examine where the contract was admitted.

When defect of
circumstances
supplied.

And as a court of equity will dispense with the form of the instrument by which an appointment in pursuance of a power is made, when it is for a valuable or good consideration; so, likewise, it will supply any deficiency in the *circumstances* required to attend the execution of such power.

Thus, where a wife, by marriage articles, had a power of appointing copyhold; by writing attested by three witnesses, appointed by writing attested by two witnesses only; yet the court said, that the articles being for a valuable consideration, namely, that of marriage, were good, though

^h *Carter v. Carter*, Mosely, 365.

ditaments subject to the power; for, a general covenant cannot be considered as an execution of the power, or take effect as a lien attaching upon the estate subject thereto: as, a covenant to make a jointure generally, without referring to any deed, or mentioning any premises from which an inference or presumption may be made of the extent of the jointure, or of the subject on which the jointure is to attach, cannot be considered even as a defective execution of a power; because there is, in such case, no ground from which a conclusion can be drawn that the person making such general covenant had the power in his contemplation, unless it be that it should be an execution, because the person who covenanted might, by proper means, have executed the power.

not in strictness pursuant to the power; for the courts in such case would supply the want of circumstances¹.

So, where *M.* having a power of disposing of 4,000*l.* by deed or will executed in the presence of three witnesses, to any person she should appoint²; being about to marry, by articles executed in the presence of two witnesses only, appointed 2,000*l.* part of the 4,000*l.* to be for the use and benefit of her intended husband during the coverture; and, after her death, to her son; Lord Hardwicke was of opinion, that the articles amounted to an appointment within the power, notwithstanding there were only two witnesses, for this court could supply that defect, when it was executed for a valuable consideration: much more when it was an execution of a trust only, as was the case here: and, although the appointment was inaccurately expressed, and in an informal manner, it would amount to a grant of the 2,000*l.* to the husband.

And, in favour of children, a court of equity will not only aid an appointment under a power defectively executed, but also a power defective in itself; as a lease made under a covenant to stand seised, in consideration of natural affection³. Nor will it be material whether such settlement under a power be made before marriage, or after it: for in cases of aiding the execution of a power, either for a wife or a child, it had never entered the view of the court, whether the provision had been for a valuable consideration or not, but, being intended for a provision, whether voluntary or not, had been always held to entitle that court to give aid to a wife or child to carry it into execution, though defectively made⁴.

Neither is it material, in the case of a wife or child,

¹ *Cotter v. Layer*, 2 P. Wms. 623; *Hervey v. Hervey*, 1 Atk. 561. ² *Bro. Chan. Rep.* 368. ³ *Prince v. Greene*, 1 Ch. Ca. 161, 264; 3 *Ibid.* 91. ⁴ See *Hervey v. Hervey*, 1 Atk. 564, 567.

² *Sargison v. Sealy*, 2 Atk. 412; *S. C. Wade v. Paget*,

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that the person who comes for the aid of the court is already provided for, unless the provision already made be extravagant; for it is an invariable rule, that the husband or the father are the proper judges what is the reasonable provision for a wife or child^a. And when the court refuses its aid or sets aside the appointment where the father or husband has done any thing extravagant, it does not, in either of these cases, break through this general rule^c; but it goes upon a collateral reason, namely, that this extravagant provision either for a wife, or one child only, is a prejudice and injury to the rest of the family; and that one branch ought not to be improperly preferred to the ruin of the rest.

But although a court of equity will, in general, aid an appointment under a power defectively executed, in favour of children, yet it will not interfere in cases where giving aid to the younger children would occasion a disinherison to the eldest; for one principle upon which the court interferes in favour of younger children against the heir seems to be, that both parties claim under the same instrument, out of the same ownership, and under like considerations, namely, as creditors by virtue of the moral debt which equity raises from the parent to the child, which debt extends as well to the younger as to the elder child. If, therefore, it appears to be the intention of the parent to pay that debt, by a just distribution of his property between the elder and younger branches of his family, and his property be sufficient to answer both purposes, a court of equity will aid a defective execution of that intention; to effect which, it considers the parent as having been absolute owner, and that, under that ownership, had a right to dispose of the property as he pleased; that he would not,

^a Per Lord Hardwicke, in 568; and see *Kettle v. Town-Hervey v. Hervey*, 1 Atk. send, 1 Salk. 187.

^c Per Lord Hardw. Ibid.

therefore, have suffered the heir to take the interest limited to him, but under an idea that the younger children would likewise take the interest limited to them; it therefore restrains the elder (in such case) claiming by the same title as the younger children, from disputing their title; considering, for this purpose, the instrument that creates the power, and the instrument by which it is executed, as one and the same. But if the consequence of providing for the younger children will be leaving the elder destitute, so that what will be equity to the one will be inequity to the other, in such case, one party having no better title to the aid of the court than the other has, it will not interfere for either party, but leaves things as it finds them^p.

So where a father, seised in fee of a great estate, by covenant to stand seised, settled the same, in consideration of natural affection, to the use of himself for life, the remainder to his eldest son, with power to himself to lease a small part for forty years^q; he accordingly made a lease for the benefit of a younger child, which the eldest son would have avoided at law, the power not being well raised by the covenant to stand seised. But, it appearing to the court that the eldest son was greatly advanced by the father, and that the conveyance, which was by covenant, was intended to have been by livery, but which he was advised would be well made by covenant, it was decreed, that the plaintiff, who was the assignee of the younger child, should hold the estate until the defendant evicted him by law; and that he should admit the power to make the lease to be good in law. For though the interposition of a court of equity, in cases where there is equity, is of common right, yet that interposition is to be governed by discretion, and must depend on all the cir-

^p See *Townsend v. Kettle*, ^q *Prince v. Greene*, 1 Ch. 1 Salk. 187; Pow. Pow. 209. Ca. 161, 264, and 3 Ibid. 91.

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circumstances of each case. The equity of these cases is not founded merely upon the ownership in the father, and his intention to dispose in favour of one child rather than of another, but it rests upon this, namely, that the intention is to make an equality of provision among those who have an equal claim; which intention a court of equity will support, by enjoining those who oppose such equitable provision, from disputing the legality of the instrument upon which it is founded. But if the intention be otherwise, a court of equity will not, if it be incompletely executed in law, aid such imperfect disposition, for their interposition is not founded upon the general right a man has to dispose of his property as he pleases, but upon his having made a proper disposition to persons, each of whose claims is founded upon a consideration, and who, in respect thereof, are purchasers^r.

Appointment
defective by
fraud.

Another ground upon which a court of equity will interpose in support of appointments defectively made, is that of fraud; as, where a strict performance of the circumstances required by the power, are prevented by the contrivance of a person interested in preventing it; in which case, if the donee of the power plainly evince his intention to execute his power, the court will validate the appointment, notwithstanding its want of form or circumstance. And, in cases of fraud, a court of law will also, it should seem, dispense with a strict performance of circumstances^r. For in the case of *Pigott v. Penrice*^s, (where the power was required to be executed in the presence of three persons not mental servants), Lord Cowper said, that if a deed had been prepared and ready to be executed, but three witnesses of the description required were prevented from being procured by the means of one who was to be bene-

^r See *Prince v. Greene*,
^s Ch. Ca. 161, 264; and
Pow. Pow. 220.

^r See Dyer, 354.
^s Comyns, 254.

fited by the non-execution of the power; the circumstances that occurred in that case, slight as they were, might perhaps have been held to be a revocation and execution of the power.

So if a man be informed by his kinsman that his son was dead, in order to get the father to settle his estate upon himself; in such case, there is no doubt but equity would set such settlement aside. And the case would be the same if the appointee, under a power executed in his favour, to prevent a revocation, were to use any false suggestions or information to the donee to mislead him and prevent him from executing his intention to revoke⁽¹⁾.

A court of equity will also support an appointment which has been defectively made by reason of accident; as, where a person express a clear intent to execute a power, and do all that circumstances permit, but is disabled by accidental circumstances, and has not the means of executing the power with the circumstances expressly required to attend the execution thereof. But the accident or intervention of death is not alone deemed a sufficient ground for the interposition of a court of equity in favour of the person intended to have been benefited by the appointment, even though the donee of the power be under a moral obligation to execute it, and although some steps have been taken towards completing his intent; for, although in cases of provision for younger children, or the like, a solemn act done by the parent, with an intent of

Defect from
accident.

¹ *Per Treby, in Bath v. v. Lord Bath*, 2 Freem. 193. *Montague*, 3 Ch. Ca. 74, 89. *Per Powell and Treby, Just.*
² *Dutchess of Albemarle* 3 Ch. Ca. 68, 89, 90, 126.

(1) Fraud and imposition are not, however, to be presumed, but must be clearly proved, or they will not be regarded in a court of equity. *Per Lord Somers and Lord C. J. Treby. See Dutchess of Albemarle v. Lord Bath*, 3 Ch. Ca. 74; 114.

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executing the power, though ineffectual in itself for want of form, might reasonably be aided in a court of equity; yet no determination has gone so far as to say, that where a man is only preparing to do an act (which he may afterwards, perhaps, repent of and refrain from completing), the accident of his death before his apparent resolution be fully effected, shall be deemed such a circumstance as to authorize a court of equity to decree such preparatory steps a complete execution of the power (1).

We have seen, that an appointment is void in many cases, on the ground of not being conformable to the power. But a stranger's joining in the appointment will not be such a deviation from the power as to affect its validity; for where a settlement was made upon one for life, remainder to another in tail, with power reserved to tenant for life to charge the premises with the payment of 2,000*l*; the tenant for life and remainder-man joined in mortgage for raising that sum, and it was objected against the appointment that his was a joint execution of the power by the remainder-man as well as the donee of the power; but the court said, that that circumstance alone would not hurt it².

It may further be observed, before we quit the subject of the form and circumstances requisite to the validity of a deed of appointment, that if lands situated in a register

² *Jenkins v. Keymis*, 1 Lev. 150.

(1) But if a power be void in its creation, or if it be so raised that it cannot be exercised, it will not, on that account, devolve on the Court of Chancery to supply any defect; for powers devolving on that court for this purpose, are such as are well created originally; but by accident, as the death of persons, or the like, cannot be executed by the donee, in which case, the court substitutes itself in his place; but when the power is void in the original, there is nothing to devolve on the court. See *Alexander v. Alexander*, 2 Ves. 640.

county, be made the subject of an appointment, such an appointment will be within the meaning and intent of the statutes respecting the registering of deeds, and must therefore be registered in order to entitle the appointee to a preference under that act: an appointment being of such a nature as to be within the provision of this act; for the words are general—"all deeds and conveyances." And an appointment is undoubtedly a deed; is executed as such, and operates so as to affect lands, tenements and hereditaments. But it has been said, that this deed is not to be considered as a separate conveyance, but only as the execution of a power, and that all the interest arises under the deed creating the power. If this construction is to prevail, there will be an end of the registry and of the act of parliament; for, by this means, a secret deed might be set up to defeat a purchaser who had registered before.

Upon similar principles of supporting appointments made in the execution of powers, where the defect is remedial without infringing upon any fixed rule of justice, courts of equity will, if the power be exceeded, correct the excess, and uphold the execution thereof, so far as the power warrants'. Thus, where Lord C. had power to grant leases, by one entire instrument, granted several leases, some of which comprised premises not within the power, they were considered as several leases, of such lands as were and such as were not within the power respectively, and it was referred to the Master to separate them accordingly". And where a man having a power to appoint both real and personal estate, by will duly executed, appointed by a will attested by two witnesses only, it was held that this was sufficient to pass the personal estate, it being a good execution of the power as to that, though not as to the

Excess in the
execution of
a power.

' *Vide Ingram v. Ingram, Marsham, Fitzgib.* 156.
2 Atk. 88; and *Peters v.* " *Cited 2 Ves.* 645.

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real estate^a. So where there is a power to appoint by way of lease for ten years, and the donee make a lease for twenty years, this will be good, in equity, for the ten years, and bad for the residue only^b. Again, where a power warrants the disposing of an absolute estate by appointment, and the donee appoints an estate, with a qualification annexed to it, the qualification will be void, as exceeding the power, and the estate be absolute. As where a father having a power to appoint an estate to his children, qualified his appointment by annexing to it a condition that they should release a debt owing to them; the appointment was held to be absolute, and the condition void^c.

So again, where a testator devised the sum of 6,000*l.* to trustees, upon trust to pay the interest to his wife for life, and gave her moreover, "the absolute disposal of the same sum unto and amongst such of his children by her, and in such proportion as she should by will direct, limit and appoint." The wife afterwards, by will, appointed a fourth part thereof to be placed out or continued on securities, during the life of her daughter C. for her use; and then upon trust, at her decease, to pay and apply the principal of such fourth part to such child or children, if any, as she, the said C. should happen to have living at her decease. This appointment, though void as to the children of C. because a power to appoint to *children* does not warrant an appointment to *grandchildren*, was held to be good so far as it was within the power, namely, so far as it made a provision for C. herself^d.

And although courts of law did not show the same favourable disposition to support the execution of powers as prevailed in courts of equity, until long after their intro-

^a *Duff v. Dalzell*, 1 Bro. c. 2 Ves. 644.

Ch. Ca. 147.

^d *Alexander v. Alexander*,

^b *Parry v. Brown*, Nels. 2 Ves. 640.

Rep. 87; 2 Ves. 641.

duction into those courts, in consequence of the statute of uses^a; yet they have, in modern times, adopted the same rule of constructing appointments and other instruments, made in execution of powers, with respect to correcting the excess and supporting the execution of them so far as is warranted by the power, as obtains in courts of equity. Thus, in the case of *Adams v. Adams*, it was held that, although *F.* the widow, had exceeded the power reserved to her, "inasmuch as she had thereby limited estates to her daughters for life, with remainders to their children (her grandchildren), whereas her power was confined to a child or children only; yet, that the same ought to prevail so far as her power extended, and that the limitation to her daughter for life was good, although the disposition of the inheritance to the child or children of such daughter was void^b. And, where tenant for life, with power to appoint by way of lease, for any term not exceeding thirty-one years or three lives, to commence in possession, made a lease, "from the date, for and during the natural life and lives of three persons and the longest liver of them, or for the term, time and space of thirty-one years, to commence from the date, which should last longest, from thenceforth next ensuing, fully to be complete and ended^c." This lease was adjudged good within the terms of the power, for three lives. For, *per cur.* in cases of this kind, all a remainder-man could reasonably expect was, that an estate, when it came to him, should not be charged beyond what was the intention of the settlor to allow those who stood before him to charge it; that it would not be so by a lease of this kind, if it be construed as a good lease for three lives, and no

^a See *Jenkins v. Keymis*, 1 *Binson v. Hardcastle*, 1 Bro. Lev. 150; *Peters v. Marsh-* Ch. Rep. 22.
am, Fitzgib. 156; Pow. Pow. ^b *Commons*, lessee of *Net-*
350. *terville, v. Marshall*, 7 Bro.
^c Cowp. 651; and see *Ro-* Park. Ca. 111.

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longer; that courts of law; which in modern times had adopted the same rules of construction as obtained in courts of equity, in the construction of powers and of the instruments by which they were executed, would, when they had been exceeded, correct the excess, and support the execution so far as it was warranted by the power; that the lease in question, so far as it was a lease for three lives, was warranted by the power; and this was apparently the primary object of the parties; and though besides this, they had a second object in view, viz. to secure the estate to the lessee for thirty-one years, in case the lease for lives should determine sooner, which was not warranted by the power, yet this did not vacate so much of the lease as was within the power.

But it is observable, that although defects arising from an excess in the execution of a power, whether such excess be by the appointment of a larger interest in the estate than is warranted by the power, or by appointing to persons who cannot be made objects of the power, or by annexing to the estate appointed, conditions not warranted by the power, will uniformly be remedied by the court, and the appointment be good *so far* as it is warranted by the power; yet the consequences of this doctrine, with respect to the interest or part in which the power is exceeded, will differ, according to the nature of such excess, for if the excess be in appointing to persons to whom the power cannot be made to extend, the appointment, so far as it relates to such persons, will be utterly void, and the subject matter of the appointment will go as if no appointment had been made of it^b. As if a man have power to appoint 1,000*l.* amongst his children, and he appoints 100*l.* amongst his children, and 900*l.* amongst others who are strangers, the appointment of the 900*l.* will be absolutely void, and go over, (if limited over for want of

^b *Adams v. Adams*, Cowper, 651.

appointment), in like manner as if no appointment had been made¹.

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But, if the excess in an appointment under a power be by the annexing to the estate appointed, a condition or qualification, which the power does not warrant; in such case, the estate appointed will not be made void by such excess, but the excess itself only will be void, and the appointment be good as well with respect to the part appointed as to the rest. As, if a father, having power to appoint 900*l.* between his three children, give 300*l.* a-piece to two of them absolutely, and qualify his appointment to the third, by annexing a condition that he shall release a debt owing to him, or pay money over, &c. the appointment will be absolute, and the condition only void². So, if a power be to appoint by way of lease for twenty-one years, and a lease be made for forty years; the lease will be good for the twenty-one years, and void for the remainder only³. And the reasons upon which the courts proceed in these distinctions, appear to be, that the excess between the proper and the improper execution of the power is distinguishable in the one case and not in the other; in all cases, therefore, it should seem, where there is a complete execution of a power, and something added *ex abundanti*, which is not warranted, and the excess can be so clearly distinguished, as that the court can draw a boundary between the excess and the execution; the execution will be good, and only the excess void: but, where the boundaries between the excess and the execution are not distinguishable, the execution will be void for the whole⁴.

And where a limitation of an estate under a power exceeds the extent warranted thereby, the appointment is not only void as to so much of the limitation as exceeds the power, but it renders void any subsequent limitation grafted

¹ *Per* Sir T. Clarke, 1 Ves.

644.

² *Ibid.*

³ *Ibid.*

⁴ See Pow. Pow. 359.

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upon it, although limited pursuant to the power: for, every instrument is to be construed as taking effect at the moment of execution, and no subsequent event can influence the construction of it one way or another. Thus, though the limitation in the above cited case of *Alexander v. Alexander*, to the children of Catharine was void, yet, it prevented the limitation over from taking effect; and that portion, it was held, would have been unappointed, although Catharine had had no children; because, if Catharine had left children at the time of her death, it would have been impossible that any of the limitations over could have taken effect; for, the children, if any, though they could not have taken themselves, would yet have prevented the limitation over. Therefore it was resolved that the fourth fell into the residue, because, as to that, it was no appointment except partially for the life of Catharine^a.

Appointment
of a less estate,
good.

And, as an appointment under a power will be good notwithstanding an excess in some circumstances attending it, if that part of the estate which is well appointed can be distinguished from that which is not authorized by the power; so, the execution of a power will be good, though it limit a less estate in that which is the subject of it, than is warranted by the power. Thus, an appointment by way of lease for ten years hath been holden good, upon a power to lease for twenty-one years^b. For the court said that, on the words, "otherwise than for three lives or twenty-one years," in the statute of leases, a lease for a less period was good. So the devise of a rent-charge out of lands in execution of a power to appoint the lands themselves, was held to be a good execution of the power^c. So also was a devise in trust to sell, and an appointment

^a Vide *Robinson v. Hardcastle*, 1 Brown's Rep. 22; *Bridgman's time*, 3 Keb. 69, 2 Durnf. & E. Rep. 253; 746.

Routledge v. Dorrel, 2 Ves. jun. 357.

^c Said in *Briers v. Bolton*

^b *Thwaites v. Dye*, 2 Vern. 80; *Roberts v. Dixall*, 2 Eq. Ca. Abr. 668, pl. 19.

of the money to arise by the sale, held a good execution of a power to appoint the lands¹.

V. OF THE EFFECT, OPERATION AND CONSTRUCTION OF AN APPOINTMENT.

As an appointment, we have seen, must have a reference to the power from whence it originates, and the person claiming under the appointment takes under the deed by which the power is created, and not under the deed of appointment²; it follows that the uses limited by the appointment, to be valid, must be such as would have been good if limited by the original deed³. Thus, where by marriage settlement an estate was conveyed, after other limitations, to trustees "in trust for such child or children of the body of *A.* the husband, on the body of *C.* his wife, to be begotten, and for such estates as the said *A.* should appoint; and in default of such appointment, in trust for the first son of the said *A.* by the said *C.* and the heirs of the body of such first son, &c. The issue of the marriage were one son, *P. S.* and four daughters. *A.* by his will, devised his estate at *W.* charged with debts and annuities, to two of his daughters, and all other his real estates to three trustees, to the use of his son *J. A.* for life, without impeachment of waste; remainder to trustees, to support contingent remainders; remainder to the first and other sons of the said *J. A.* the son, in tail general; remainder to daughters, &c. *J. A.* the son entered and suffered a recovery to the use of himself in fee, and afterwards devised the same to *H.* in fee, charged with an annuity, and subject to the annuities before mentioned. And, on a case referred to the Court of King's Bench from the Court of Chancery, the question was, whether the testator *A.* the father, could make the limitation con-

¹ *Kenworthy v. Bate*, 6 Ves. 792; *Long v. Long*, 5 Ibid. 445.

² See 1 Ves. jun. 510.

³ *Robinson v. Hardcastle*, 2 Durnf. & East, 24, b.

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tained in the will in execution of the power of appointment given him by the marriage settlement? The case was twice argued.—Buller, Justice, upon the first argument, observed, that, as to the legality of the appointment of an estate for life to J. A. the son, under the power reserved in the settlement, every execution of a power must be coupled with the power itself, so that those who claim under the execution must derive their title from the power. Now, suppose in the original settlement, which contains the power, the estate had been limited in the same manner that it is in the will to J. A. the son for life, it would have been void; for there was no such person *in esse* at the time. Then can any estate or use which is limited by the execution be good, which would have been void if inserted in the original power? In the case of the *Duke of Marlborough v. Lord Godolphin*, in Canc. (Tr. 33 Geo. 2.) there was a clause inserted in the will, that certain trustees and their heirs, on the birth of each son of the tenants for life, should revoke the uses limited in tail male, and limit the premises to them for life, with remainder to their sons in tail male. Lord Northington there said, “This is a clause so new, as not to have acquired a name. It is a wonder that it should be a question in a court of equity, which is a jurisdiction of reason, whether, though the Duke of Marlborough could not lock up his property in this manner himself, yet might he not deliver up the keys to another, and empower him to do it? that is to say, in other words, *non potest facere per se, sed potest per alium; non per directum, sed per obliquum*. If these innovating modifications could be allowed, as the law is a system of wisdom, it would allow it by direct limitation; but to say this cannot be done by direct limitation, and yet to say that the thing may be done by I know not what magic, would make it a system of puerility and jargon.” And after the second argument, he said that he had no doubt upon the question, for that if a child, to whom an estate is limited under a

power is not born at the time when the power is created, he can only take an estate of inheritance.

But though an estate, limited under the execution of a power to the issue of a child unborn at the time of the creation of the power, as purchasers, would be bad, for the reasons suggested by the learned Judge in the case last mentioned; yet there does not appear to be any objection to the validity of a limitation for life to a person not *in esse*. And such limitations have in fact been admitted and recognized in several adjudged cases¹. But it is the limitation over the remainder in tail to the issue of such unborn person as purchasers, that is repugnant to the rule of law on the execution of a power relied on by Mr. Justice Buller, in the case of *Robinson v. Hardcastle*².

It may further be observed in this place, that any interest which a man may entitle himself to by virtue of a power of appointment *ad libitum*, is looked upon in equity as part of his estate, and as such will be subject to the demands of his creditors. Thus, where a person created a term to raise a sum for such purposes as he should think fit, and by will appointed it to his daughter, the Lord Keeper decreed that it was, notwithstanding, subject to his debts.

A power to
appoint assets.

And though a person, having a power to appoint at pleasure, actually execute it in favour of third persons, yet, if there be creditors not satisfied, it will be considered, as to them, as part of the estate of the appointor, and subject to his debts. Thus, where *I. S.* on sale of lands,

¹ See *Lovelace's case*, Saville's Rep. 75; 2 Leon. 35, pl. 48; *Denn* on dem. *Bredon v. Page*, 3 Durnf. & East, Term. Rep. 87, in note; *Hay v. Earl of Coventry*, Ibid. 83. For further observations on this subject, see *Fearne's Cont. Rem. and Ex. Dev.* 4th edit. vol. 2, 327 note; and

Ibid. 347, 349, in note, by Powell.

² *Lassels v. Lord Cornwallis*, Pre. Ch. 232; *Bainton v. Ward*, 2 Atk. 172; *Shirley v. Ferrars*, cited Ibid.; *Lord Townshend v. Wyndham*, 2 Ves. 8, 11; see *Pow. Pow.* 239.

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took a bond from the purchaser, to pay any sum not exceeding 500 *l.* as he should by will appoint^x; *I. S.* by will, appointed payment of it to his relations. But a bill being brought by his creditors, the court held, that, having power to dispose of the 500 *l.* at pleasure, it must be looked upon as part of his estate; and considered as assets liable to the payment of debts.

And, even if the donee of a power to appoint, appoint to a third person, in trust for him to appoint to other persons, and he actually do so appoint accordingly, yet, if the trust be such as that it is optional in him to observe it or not, the claim of his creditors will be preferred to that of the persons to whom he has appointed; for, in this case they claim under the appointment or gift to him, which is paramount his disposition under the recommendation. Thus, where a sum of money was settled in trust for such persons as the wife should appoint; she appointed to her husband, to be employed by him to such purposes or intents as he should think fit^y. He, by his will, devised it amongst the children of a poor clergyman, and declared, that such disposition was in pursuance of his wife's direction. The creditors of the husband brought a bill to have the money applied to the payment of their debts, as part of his assets. And, *per curiam*, the question is, whether the wife considered him as a trustee of the money, and a bare instrument to convey to other persons, or, whether he had the ownership; if it were his own property, certainly no act of his could dispose of a creditor's right. If a man had the use of a thing, and the power of giving it to whom he pleased, he was undoubtedly the owner of it. Here, it was given to be employed in such purposes as the husband should think fit; and there was no instance of a construction in favour of legatees to the prejudice of creditors, unless the creditors founded their right under the will itself.

^x *Thompson v. Towne*, 2 Vern. 319. ^y *Hinton v. Toye*, 1 Atk. 465.

And an express declaration that the property appointed shall be exempt from the debts of the appointee, will not avail. Where, therefore, an appointment was upon trust, to apply money from time to time in a manner most beneficial for the personal support and maintenance of a brother, his wife and children, but not for the payment of his debts, it was, so far as it exempted it from debts, held a bad appointment: for, in that restraint, the appointor had exceeded the power given by law, because the interest in the fund, when appointed, must be left to take the fate of being the property of the appointee, and, of consequence, would be subject to the claims of his creditors².

VI. THE MEANS BY WHICH AN APPOINTMENT MAY BE DEFEATED, ANNULLED, OR VARIED.

AN appointment may be defeated, annulled, or varied, either, 1. For want of the circumstances required by the power to attend it (which has already been considered); 2. by an extinguishment of the power by which the appointment is authorized to be made; 3. by a deficient consideration, or by fraudulent circumstances attending the making; or, 4. by a revocation of the uses when made; 5. by execution, without reserving a new power.

1. With respect to the extinguishment of the power authorizing the appointment, a distinction has been taken between those powers which are simply collateral, and those which are not simply collateral, but relate to the land over which the power is to be exercised; the latter of which may be extinguished by act of the donee, but not the former; for as a power, which is simply collateral, conveys no interest whatever to the person who is to execute it, either in the estate out of which the power takes effect, or in the estate created by virtue of the power, the law considers such person as having barely a naked autho

Extinguishment
of powers.

² 2 Ver 645.

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ity to do the act necessary to execute the power, and therefore holds, that any act done by such person, with a view of affecting the estate, is, *quoad* the exercise of the authority, merely void, and will not extinguish his power: if, therefore, a feoffment or release be made, or a fine be levied, of the estate, by a person who is donee of such simply collateral power, it will be wholly nugatory as to the extinguishment of his power; for powers given to strangers, being intended for the benefit of some third person, the extinction of them would be injurious to the person intended to be benefited by them^a.

Collateral powers, moreover, not being in the nature of rights or titles, cannot, from their nature, be released.

With respect to their not being destroyed by feoffment, fine or recovery, every man, it is said, is estopped from claiming any estate contrary to his own feoffment; but if a stranger, with a power of revocation, makes a feoffment, levies a fine, or suffers a recovery, and afterwards revokes, the person claiming the estate under the revocation is in immediately by, and makes his title immediately from, the original settlor or deviser, and not by or from the feoffor, conusor or recoverer: he is not therefore bound or estopped by any act of the feoffor, conusor or recoverer. Thus, by the old law, if *cestui que use* devised that his feoffees should sell his land, and died, and his feoffees made a feoffment over; yet it was held, that the feoffees might sell against their own feoffment, because the power to sell was merely collateral to the right to the land, and the vendee took nothing by the feoffment.

But with respect to powers not simply collateral, but relating to the land which is the subject of the power, it is widely different; for where powers are given or reserved to any person who has an estate or interest, either present

^a 2 Ves. 79; Hard. 415; S. C. Moor, 605, 5th Reso-
14 H. 7, fol. 1, b; 1 Rep. 111; lution.
Digges's case, Ibid. 174;

or future, in the land, the exercise of these powers is considered as advantageous to him; and there is therefore no reason why he should not be allowed to part with, or exclude himself from the benefit of them.

Such of those powers, therefore, as are in the nature of powers annexed to the estate, may, it is agreed, be extinguished by release, feoffment, fine or common recovery. These powers also are liable to be extinguished or suspended by any of the conveyances which are said not to operate by transmutation of the possession, as bargains and sales, leases and releases, and covenants to stand seised; for whoever has an estate in the land, may convey that estate to another, and it would be unjust that he should afterwards be admitted to avoid, or do any thing in derogation from his own grant; any assurance of this nature, therefore, which carries with it the whole of the grantor's estate, is a total destruction of the power appendant to that estate; and, by parity of reason, any such assurance as carries with it a part only of such estate' (as a term for years or an estate for life) suspends, during the continuance of that estate, the exercise of the power, or at least the estate to be raised by it, and any such assurance as induces a charge only upon the estate, as a grant of a rent, necessarily subjects the estate created by the power to that charge^b. Thus, if tenant for life, with a power appendant to revoke and limit new uses, make a lease for life; this will suspend his power over the fee^c. So, if tenant for life, having a power to make leases for one-and-twenty years, or three lives, charge the land with a rent, and then execute his power, the charge will not be thereby defeated during his life-time; and it would be the same, if he had before covenanted to stand seised to the use of another during his life, because the power in that case is annexed

^b Co. Lit. 342, b. n. (1); ^c 2 Rol. Abr. 263, pl. 2,
but see *post*, 376, *Jenkins v.* 35, 40.
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to the estate^d. But if such tenant, with a power appendant to make leases, make a lease for a *year* only, this neither suspends nor extinguishes the power; nor is it considered as a charge upon it: but, being for a less estate, it operates as a partial execution of the power. So if a feoffment be made to the use of *A.* for life, with remainders over; with power for *A.* to revoke the uses, and to limit new uses in fee, or in tail; and then *A.* bargain and sell the land to *B.* for a month, and afterward grant the reversion in fee to *C.* and then *B.* attorn to the grant; this is good revocation and limitation of new uses, according to the power; for the making of the lease for years is not any suspension of the power as to the fee, for he may revoke for part; as he may limit an estate for years, and that will be good for the term; and, afterwards, he may limit it in fee to another, but that revokes not the lease for years before made; for, if it were, he would then defeat his own act, which the law will not suffer him to do; also the lease for a month and the grant of the reversion, being, in this case, one common assurance, shall be taken as an entire act^e. So, if one having a power to revoke an use make a lease for years, and then levy a fine for *assurance of the lessee*, without any other express use, such fine will not extinguish the power of revocation, but only suspend it for the term; because the express intent of the fine being declared, it cannot operate for any other purpose^f. Nor will a feoffment, if made for farther assurances, operate as a defeasance of a power^g.

A power appendant may also be destroyed by the donee, either by a release of the power, or by an alteration of the estate to which it is annexed in privity, or, it may be defeated by a subsequent act. Thus, where *A.* by deed in-

^d Hard. 415, *per* Hale; and see 1 P. Wms. 776.

^e *Snape v. Turton*, 2 Rol. Abr. 263, pl. 2; S. C. W. Jones, 392; and Cro. Car. 472.

^f *Bullock v. Thorne, Moor*, 615.

^g *Perret's Ca.* 2 Rol. Abr. 795; S. C. Moor, 368.

dedented, enfeoffed *B.* to the use of *A.* for life, and after to the use of *C.* in tail, remainder to the use of *D.* in tail, remainder to *E.* in fee; with a proviso, that if it should happen that *F.* should die without issue, it should be lawful for *A.* by deed indented, to alter or determine any use or purpose limited by the feoffment. Afterwards, *A.* made a feoffment of the premises to another in fee, and then, by deed, released to *B. C. D.* and *E.* his power of revocation, after the death of *F.* without issue; and all his power, liberty and authority relating thereto; and further granted to them and their heirs, that the same should cease and be to all intents void. *F.* died without issue; and afterwards *A.*, by deed made pursuant to the requisitions of his power, altered the uses of the former indenture, and limited new uses. Upon this case, three questions were made: First, whether such power of revocation to be executed in future, might be destroyed by feoffment: 2dly, Whether, if it had been reserved to be executed *in presenti*, it might have been released: 3dly, Whether such power might be defeated by an act of all the parties concerned in reserving it. And, upon conference with all the Judges, Wray (C. J.) was of opinion, upon this point, that a power, as well to revoke as to limit new uses, might be utterly gone and extinguished by a fine or a feoffment¹. And, upon the second point, it was agreed by the whole court, that if the power of revocation had been *in presenti*, as the usual provisoes of revocation were, it might have been extinguished by release, made by him who had such power, to any who had an estate of freehold in the land, in possession, reversion or remainder (1); and thereby, the estates, which were before

¹ *Albany's case*, 1 Co. 111.

(1) And hence it is the common practice in conveyancing, to release the power, and all further claim to it, whenever it is either completely executed, or it is not intended to proceed further in the execution of it.

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defeasible by the proviso, would by such release be made absolute; but made no resolution as to whether a future power might be released^k. And so, upon the third point, it was also held, that by the defeasance, as well the said covenant which created the power, as the power itself, was utterly defeated and annulled. For it was said that, in all cases where any thing executory was created by deed, the same thing, by consent of all persons who were parties to the creation of it, might, by their deed, be defeated and annulled; for it would be strange and unreasonable that a thing which was created by the act of the parties, should not, by their act, with their mutual consent, be dissolved again. And it was clearly held, in the fourth resolution in *Digger's case*^l, that a fine levied by tenant in tail, before a power of revocation had been completely executed pursuant to the forms required in the creation of it, extinguished the power.

And so, an assignment of the whole interest of the donee, or any total alteration of the estate for life to which a power is appendant, will destroy the power^m. But a lease and release, which does not take effect so as to displace an estate, will not, it seems, destroy a power appendantⁿ; for, where one, being tenant for life, and having a power by deed or will to charge land with 2,000*l.* as he should think fit, joined with the remainder-man in tail, in a lease and release, to convey the premises in fee by way of mortgage for securing a sum of money and interest; it being held that this mortgage was not a good execution of the power, it was then contended, that tenant for life had, nevertheless, conveyed all his interest out of him, and so was disabled to execute his power afterwards. But the court were of opinion, that the power was not destroyed,

^k See Pow. Pow. 17.

^l *Digger's case*, 1 Rep. 174; and see *Browne v. Herring*, 2 Show. 185; 1 Vent. 268, 371; Skin. 53, 72, 186.

^m Hard. 416; 1 Vent. 226.

ⁿ *Jenkins v. Keymis*, 1 Ch. Ca. 103; and see *Edwards v. Slater*; but see Co. Lit. 342, b, n. (1), and *ante*, 373.

because the conveyance was by lease and release, and not by fine or feoffment.

Finally, the power may be destroyed by the bankruptcy of the donee^o.

With respect to such powers relating to land as are said to be in gross: As the estates raised by them do not fall within the compass of the estate to which they are said to relate, there does not seem to be any reason why any alteration in that estate should affect them. Hence, if tenant for life, with a power to jointure an after-taken wife, conveys a life estate by bargain and sale, lease and release, or covenant to stand seised, this conveyance will not affect the power of making a jointure. If he even makes a conveyance in fee by any of these assurances, as it is not their operation to pass a greater estate than the grantor has a right to convey, the power in gross is not affected by it; but if he conveys by fine, feoffment or recovery, as these assurances not only pass the estate of the grantor, but convey a tortious fee, they necessarily disturb the whole inheritance, and consequently divest the seisin, out of which the uses to be created by the power are to be fed. They therefore operate in extinction of the power^p. Thus, it was agreed by the court, in the case of *King v. Melling*^q, that a common recovery suffered by tenant for life of an estate with a power to make a jointure, would bar the power; for, that the recompense in value was of so strong a consideration, that it served as well to bar rents, conditions, powers, possibilities, &c. arising out of or depending upon the land, as the land itself.

A power in gross may also be released to any of those in remainder: and if the whole fee is in the terre-tenant, subject to the power; as where an estate is limited to A. for life, remainder to such uses as he shall by deed or will appoint, remainder to A. in fee; there, if A. conveys the

Power may be released.

^o See *Doe v. Britain*, 2 Barn. & Ald. 93.

^p See *King v. Melling*, 1 Vent. 228.

^q Ibid.

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How an appointment defeated after execution.

Void for turpis consideration.

Void for fraud.

Stat. 27 Eliz.
c. 4, s. 5.

whole fee by lease and release, his power of appointment, notwithstanding it is in the nature of a power in gross, is totally extinguished².

2. An appointment may also be rendered nugatory and void, for various causes, after it has been made, as by being founded on an immoral consideration, by reason of fraud used in the making or obtaining it; or, above all, by an express or implied revocation of the uses appointed.

An appointment under a power must be founded upon a good consideration, or at least upon a consideration that is harmless; for if the consideration of the execution of a power be immoral, it will be set aside in equity. Thus where, under a power to make leases, a person made a lease, purporting to be in consideration of money, but which in fact was upon a marriage brokage, for procuring a marriage between two parties, the lease was held void; for though it was objected, it could not be supposed that, after such a length of time as twenty years, (which was the case,) proof should be made of the payment of the consideration money, especially by assignees who were strangers. Yet, *per curiam*, if it be a lease for a marriage brokage, it must be set aside, being *ex turpi causa*; and there is no difference between a bond and a lease.

So, a court of equity will not only refuse its aid in support of a power defectively executed, if the object of it be inequitable, but it will relieve against an appointment under a power effectually executed in law, if fraudulently made, as contrary to a prior disposition to a purchaser for a valuable consideration³.

And, to prevent fraudulent appointments and other conveyances, with power of revocation, it is enacted by 27 Eliz. c. 4, "that if any person make any conveyance, charge, limitation of use, or assurance of any lands, tenements or hereditaments, with a clause or condition of revocation,

² See *Ca. temp. Talbot*, 41. *al.* 4 *Brown's Ca. Parl.* 237;

³ *Scrope et al. v. Offley et* and see *Fitzgib.* 214.

determination or alteration at pleasure, and shall afterwards convey or charge the same lands, &c. for money or other good consideration, paid or given, (the first conveyance not being revoked or altered by virtue of the power,) that then the said former conveyance, &c. as touching the said lands, tenements and hereditaments so afterwards conveyed or charged, shall, as against the vendees or grantees, their heirs, &c. be void and of none effect: provided, that no lawful mortgage made *bonâ fide* and without fraud or covin, upon good consideration, shall be impeached or impaired by force of this act."

Upon this clause in the 27 Eliz. it has been determined, that marriage is a valuable consideration within the meaning of this statute¹.

But a settlement made for a *good* consideration only, as for provision for children, will, if made with power of revocation in the settlor, be void against a purchaser for a *valuable* consideration².

Thus where *E.* seised in fee of certain estates, in consideration of love for his son, settled them to the use of himself for life, remainder to his son in tail, with power in himself to make leases for twenty-one years, and power also to revoke all the use of the settlement. *E.* in consideration of 30*l.* demised to *F.* for twenty-one years, and it was questioned whether this should be said to be a lease derived out of his estate for life only, or whether the lessee should have benefit of the clause of the 27 Eliz. c. 4, "that if one make a conveyance with clause of revocation, and afterwards, for consideration of money, grant the said land to a stranger, that the said conveyance shall be void and revoked, &c.?" And it was held by all the Justices, that the lease should be good and absolute, and should not be impeached by the former voluntary conveyance. For, that he who made it having power to revoke it, the law

¹ See *Griffin v. Stanhope*, ² *Cross v. Faustenditch*, Cro. Ja. 454; and see Rob. Gra. Jac. 180. Fraud. s. 3.

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would consider the conveyance as revoked and void, *quoad* the lessee, and the lessor as tenant in fee, when he made that lease : and, that the lease, being made in consideration of a fine paid, was expressly within the words and intent of the statute of 27 Eliz.

And the reservation of rent on such a lease, will, it seems, be considered as such a good consideration, as to operate as a revocation of a voluntary conveyance previously made; for it was resolved by the Court of King's Bench, in *Hinde v. Collins*, that where one made such a conveyance first, and afterwards made a lease reserving rent, without other consideration, that was sufficient, and a revocation of the first estate, *quoad* that lease^x.

And although the power of revocation in such conveyance be limited to be executed at a distant time, yet if a subsequent conveyance upon valuable consideration be made afterwards, but before the power of revocation begins, this case will also be within the remedy of the statute; for although the statute says, "the said first conveyance not being by him revoked," which seems by the literal sense to be intended of a present power of revocation, because no revocation can be made by virtue of a future power until it comes *in esse* : yet since, if this case should be construed to be out of the act, it would serve for little or no purpose, as then there would be no difficult matter to evade it; it has been held, that the intent of the act was, that such voluntary conveyance, which was originally subject to a power of revocation, whether *in presenti*, or *in futuro*, should not stand against a purchaser *bonâ fide* for a valuable consideration. Thus, where a conveyance was made by way of use, with power to revoke after a certain day to come, and, before the day came, he who had the power conveyed to a purchaser; it was held in the King's Bench, that the original conveyance was void against the purchaser; and yet, at the time of the purchase, the vendor

^x *Hinde v. Collins*, cited Cro. Ja. 181.

could not have revoked ; but the statute is to be intended against fraud and to support purchases¹. Such conveyance will not, however, be void against a purchaser *before* the time limited for the revocation arrived ; but, from that time, all subsequent interest under the original conveyance will be void, because it is subjected to revocation from that time by express agreement.

And, although the power be afterwards extinguished by recovery, feoffment or fine, or other conveyance to a stranger, to the intent to defraud a purchaser ; yet if the conveyance be originally voluntary, and with power of revocation, such fine, feoffment or other conveyance will be void, as to the extinguishment of the power, and the original conveyance bad against a subsequent purchaser for money². For the intent of the statute was, that it should be expounded altogether against fraud, and to suppress fraud, and to maintain just dealing ; and to support such conveyance would be against the intent of the statute. And the extinguishment of the power of revocation, before the sale, does not alter the object and intent of the statute ; for, when the power determines, then it is impossible that the conveyance shall be revoked according to the power, and, if it cannot, then the statute makes the conveyance void against the purchaser ; for it says, “ that if any one make a conveyance with power of revocation, and afterwards sell the land for money, the conveyance not being revoked according to the power, the conveyance shall be void.” And to construe the statute that the conveyance should be good against the purchaser, if the power of revocation be determined before the purchase, would be to nourish, not to suppress fraud ; for then the seller might make a secret release of the power, or a secret feoffment, of which the purchaser could not have notice ; and yet he might show the purchaser the conveyance in

¹ Cited *per* Walmesley, Justice, Moor, 618.

² *Bullock v. Thorne, Moor*, 615.

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which was a power of revocation, by which he might be encouraged to buy the land, and be deceived out of the land and money both, by such secret release or feoffment, which would be against all reason and equity.

And although property, over which the power of revocation is reserved, be conveyed by several different assurances; yet, as to the operation of this act, all of them shall be considered as but one conveyance^a. For the words of 27 Eliz. are, "that if any one person made conveyance or assurance with revocation, &c." which word assurance comprehended all the conveyances that concurred to the assurance intended by the parties, though they were of different natures.

And it is not necessary, it seems, that a conveyance, to fall within the statute of 27 Eliz. should contain an express power of revocation; for if there be circumstances reserved therein in favour of the settlor, which, in their operation, are tantamount to such power, they will be sufficient to bring the assurance within the meaning and intention of this act. For, where *P.* conveyed his estates to trustees, to pay all debts contracted, or for which the trustees were bound, for fifteen years, with power to *P.* to make leases for 99 years, with or without rent; it was admitted by the court on a trial in ejectment, that the power in *P.* after present debts paid, to make an entire lease for ninety-nine years, with rent or without, amounted to a power of revocation^b.

But it is said, in *Keble*, to have been held by Lord Chief Justice Bramston, that if such power of revocation, in a voluntary settlement, be with a reservation, not to be executed, unless with consent of a third person, who is not under any influence of the party to whom the power is reserved, so that the interposition of such third person's assent is not put merely as a shift to place the power in

^a *Bullock v. Thorne, Moor*,
615.

^b *Lavender v. Blackston*,
3 Keb. 526, pl. 11.

other names besides that of the person making such voluntary conveyance, but such person is really meant to be a party to the revocation, and joined to prevent its being made, unless upon valuable consideration; this would be good, and not a voluntary consideration within the statute of Elizabeth^c. The case alluded to in Keble is, probably, that of *Sir Francis Leigh v. Winter*^d; where Sir Francis Leigh assured, by fine, certain manors and lands to himself for life, remainder to his son in tail, with proviso of revocation if his son married without his consent; and afterwards, by indenture between himself and Bridget Winter, the grandmother of his said son on the part of his mother, reciting the said proviso and the power contained therein, and certain considerations given to the said Sir Francis, it was agreed that the said Sir Francis Leigh should not revoke any of the uses or estates limited for the said son or his heirs, by the indenture aforesaid, nor execute any power of revocation concerning the same, without the consent of Lord Coventry first had in writing: afterwards, the son married without assent of the father; whereupon the father alone revoked the settlement. Upon a suit in Chancery, it was held that, by the said second indenture, the power of revocation, which was absolute in the first indenture, was restrained, and that the said Sir Francis Leigh could not revoke without the consent of the Lord Keeper; for the power was executory, and, by subsequent agreement by indenture, might be defeated and determined. But it is observable on this case, that the question arose between the son and the father, and was only whether the father, by the subsequent act, had restrained his absolute power; this case, therefore, does not decide the question as to a purchaser for a valuable consideration; nor have I met with any case that goes so far as to say, that a mere voluntary conveyance, with power of revocation reserved,

^c 3 Keb, 751. pl. 27.

^d *Leigh v. Winter*, Sir W. Jones, 411.

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but restrained to be executed with the consent of third persons, shall not be within the equity of the statute of 27 Eliz. In the case of *Buller v. Waterhouse*^c, indeed, the point was considered, but does not seem to have been settled; because all the claimants under the conveyance were purchasers for a valuable consideration. The distinction, however, between the cases where powers of revocation restrained to be exercised with the consent of a third person are, or are not, within the meaning of the 27 Eliz. seems to be this: if the interposition of a third person in the execution of such a power be merely colourable, and to evade the statute, (which is a fact to be positively proved, or a conclusion from circumstances that necessarily import as much,) the statute will operate notwithstanding^f. As if A. reserve to himself a power of revocation with the assent of B^g; and, afterwards, A. bargain and sell the land to another, the bargain and sale is good, and within the remedy of the statute; for otherwise, says Lord Coke, the good provision of the act, by a small addition and evil invention, would be defeated. So it was held in the case of *Lavender v. Blackstone*, before mentioned, that although the lease (which there operated as a power of revocation) was restrained to be by the assent of a third person; yet, that person not being a creditor, but a relation and father-in-law, the interposition of his assent did not prevent the lease from being fraudulent^h. But, if the intervention of third persons, in the execution of a power, be to preserve or protect the rights of others, as of a wife or children, and not merely to evade the words of the statute; in such case, the general doctrine laid down in the precedents seems to warrant a conclusion, that the power of revocation, though reserved to the owner, is considered as being qualified, and out of the equity of the statute;

^c *Buller v. Waterhouse*, T. Jones, 94; S. C. 3 Keb. 751, pl. 27; and see Rob. Fraud. 639.

^f See Pow. Pow. 333.

^g 3 Rep. 82, b.

^h 3 Keb. 526, pl. 11.

because, although the revocation be reserved to him, yet it is so clogged, that he can make no use of it without the assent of others, who have an interest in resisting such revocation, unless upon sufficient consideration.

And a conveyance, with power of revocation, on payment of a small sum by the revoker, will, it seems, be within the statute, and void against a purchaser for a valuable consideration. Thus it was said by the court in *Griffin v. Stanhope*¹, that if a lease be made with a proviso, that if the lessor pay 10*s.* then the lease shall be void, such lease would be void under the statute as to a purchaser; because it was apparent that the sum to be paid was not of the value of the land, but only limited as a power of revocation.

But a power to charge an estate settled with a particular sum by way of mortgage, or otherwise, has been held not to be within the words of this statute. Thus, where a power was given to the owner of an estate, settled on himself for life; remainder upon his son in tail special, to charge the estate with the payment of 2,000*l.* it was objected, that this settlement, being with a proviso to charge the lands with the payment of 2,000*l.* was void against a purchaser for valuable consideration, within the provision of stat. 27 Eliz. c. 4. "which made conveyances, with power to revoke, alter or determine, at the will and pleasure of the owner, void." But the court held, that such proviso to charge the estate with 2,000*l.* was not a power within the words of the statute; "to revoke, determine or alter the estate," being to charge a particular sum; and no express fraud being found, the conveyance could not be adjudged fraudulent².

It is to be observed, however, that none can take advantage of this clause in the statute of 27 Elizabeth, against conveyances with power of revocation, except he who is

¹ Cro. Jac. 454.

² *Jenkins v. Keymis*, 1 Lev. 150; S. C. 1 Hard. 395, b.

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a purchaser for money or other valuable consideration; for, the benefit of the clause is expressly restrained to those who purchase for money or other good consideration, paid or given, which word paid is to be referred to money, and given is to be referred to good consideration; so that the sense is for money paid, or other good consideration, given, which words exclude all considerations of nature or blood, or the like, and are to be intended only of valuable considerations, which may be given; and therefore he only who makes a purchase of land for a valuable consideration, is a purchaser within the statute¹. Therefore, where one made a lease for eighty years without consideration, and afterwards conveyed the land to his wife for a jointure after marriage; it was resolved by the two Chief Justices, and three other Justices, that because this last conveyance was voluntary, without valuable consideration, the wife could not avoid the former lease, by averring that it was fraudulent².

And one who claims relief under this statute, must not only be a purchaser for a valuable consideration, but also must himself be free from all imputation of fraud or deceit: for, *per* Anderson, Chief Justice of the Common Pleas, where a man who was of small understanding, and not able to govern the lands which descended to him, and was given to riot and disorder, by mediation of his friends, openly conveyed his lands to them, on trust and in confidence that he should take the profits for his maintenance, and that he should not have power to waste and consume the same; and afterwards, he, being seduced by deceitful and covetous persons, bargained and sold his land, being of a great value, for a small sum of money; this bargain, although it was for money, was holden to be out of this statute; for this act was made against all fraud and deceit,

¹ 3 Co. 82; *Twyne's case*, Cro. Eliz. 445; 2 Rol. Rep. 305, 306. ² Cited *per* Beaumont, Justice, Cro. Eliz. 445.

and doth not help any purchaser, who doth not come to the land for a good consideration lawfully, and without fraud or deceit. And such conveyance, made on trust, or with power of revocation, is void only as to him who purchases the land for a valuable consideration *bonâ fide* without deceit or cunning^a.

And it is observable upon the two preceding cases put by Beamond and Anderson, that the reasoning of them applies equally to the clause in the statute respecting conveyances with power of revocation, as to that respecting fraudulent conveyances; for the construction of the statute as to this point must be the same as to all clauses of it; and Owen said, in the case of *Upton v. Basset*^o, that he was at the making of this statute, and that special care was taken that there should not be any words which should extend to purchasers, unless it were such as paid money or other good consideration for their purchase.

And notice of such conveyance with power of revocation will not prevent a purchaser for valuable consideration from setting the same aside under the statute; for the notice of a purchaser cannot make that good which the act of parliament has made void as to him; and though it be true that *qui scit se decipi, non decipitur*, yet, in this case, the purchaser is not deceived, for the conveyance with power of revocation of which he has notice, is void as to him by the statute, and therefore shall not hurt him, nor is he, as to that, in any manner deceived^p.

An appointment in exercise of the power will, moreover, have the effect of annulling by exhausting the power; but this may be either total or partial, according to the extent of the appointment. Where the execution totally exhausts the uses to be appointed, it is a total revocation or extinguishment of the power^q; but if the appointment

Power ex-
tinguished by
appointment.

^a Cro. Eliz. 445.

^o 3 Cro. 445.

^p See *Gooch's case*, 5 Co. 295.

^q *Fitzgerald v. Fauconberge*,
Fitzg. 207; 6 Bro. P. C.

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be by way of mortgage only, it will be an extinguishment of the power *pro tanto* only; for in equity, a mortgage is considered as a pledge only of the estate, and the mortgagor still continues in possession^c.

CHAP. VI.

OF REVOCATIONS.

REVOCATIONS.

THE last mode we shall notice by which an appointment may be rendered void is by REVOCATION.

A power to appoint the uses of land, unless simply collateral^a, we have seen, includes in it a right to appoint absolutely, or with a power of revocation and new appointment, although no express power of revocation be reserved in the deed creating the power of appointment^b; and also that in the deed of appointment itself, a power may be reserved for the same purpose. Hence it becomes necessary to inquire into the form and circumstances requisite to attend a revocation of uses, as well as into those which are requisite to attend the original appointment of them. As to which, it is to be observed, that no express words seem to be necessary either to the creating of a power of revocation, or of effectuating the revocation itself; for, if the intention be clear, the court will construe the expressions, so as to support the intention^c.

And such power to revoke may be given to the extent of the whole limitation of the estates subjected to it, or only as to a part of it; as if a man make a feoffment to the use of J. S. for life, with remainders over, with power to revoke

^a *Perkins v. Walker*, 1 Vern. 97, 144, 182.

^b *Wall v. Thurborne*, 1 Vern. 355.

^c See *Adams v. Adams*, Cowp. 651.

^c *Bishop of Oxon v. Leigh-ton*, 2 Vern. 376; and see *Lavender v. Blackstone*, 3 Keb. 526, pl. 11.

the estate for life only, and that then another shall have that estate, and that the remainder shall continue as at first limited, this is a good power^d.

A power of appointment, if it be a power *relating* to the land, includes in it a power to appoint absolutely and outright, or with a power to be reserved in such appointment, to revoke the appointment when made, and appoint new uses; if therefore the donee would wish to be at liberty to revoke the uses appointed, it will be necessary that he should reserve such power, and so *toties quoties*; for otherwise the first power will be exhausted, and no further use can be made^e.

But it is to be observed, that when the power of appointment does not relate to, but is collateral only to the land, the person to whom such collateral power is given, cannot, in an appointment made in pursuance of his power, reserve a power to revoke the uses by his appointment^f; for in such case the power is but an authority, and, when executed, is gone.

And it is observable, that wherever there is a power of revocation, the law gives the revoker a power to limit new uses, although no power of new limitation be expressed in the deed; for, he that has power to revoke, has also power to limit^g. And such new uses upon a revocation may be limited or raised by the same conveyance which revokes the ancient uses, as well as by a new conveyance; for the ancient uses ceasing *ipso facto* by the revocation, without claim or other act, the law will adjudge priority in the operation of one and the same deed, although it be sealed and delivered at one and the same instant: and, therefore, such deed will, in construction of law, be first a revocation

^d *Thomson v. Freston*, 2 Rol. Abr. 262, pl. 1.

^e *Hill v. Bond*, 1 Eq. Ca. Abr. 342; Prec. Ch. 474; *Adams v. Adams*, Cowp. 651.

^f *Wall v. Thurborne*, 1 Vern. 355.

^g Per Finch, Lord Keeper, 1 Ch. Ca. 242; *Colston v. Gardner*, 2 Ch. Ca. 46, S.L. *Lady Hastings's* case, cited 3 Keb. 7, Ca. 7; but see also *post*, 400, and 1 Stra. 584.

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and cesser of the ancient uses, and then a limitation or raising of the new uses^b. And the rule of law will be the same, as to the ceasing of the estate, although the uses be raised by a recovery, and not, as in the case last cited, by a covenant to stand seised. Thus the court held, in *Fitzwilliam's* case, that it was all one where he who made the revocation was seised or possessed of the land; for the best construction of the statute of 27 Henry 8, of uses, was to make them subject to the rules of the common law, according to which, if two acts were done by one and the same means, and took place in one and the same instant, the law would so construe it, that that act should be taken in law to precede, which would give efficacy to to the entire instrument^c. Nor will the manner of wording a power, so as to distinguish the revocation and ceasing of the former uses, from the limiting the new uses, and mark them as separate acts, make any alteration in the legal construction thereof^d. For, *per cur.* in the same case, the ancient uses may, notwithstanding, be revoked, and the new uses well declared in the same deed; because, first, in judgment of law, there are but two times concurrent in one instant, namely, the time of the ceasing of the former uses, and the time of the declaration of the new; for, although the revocation and the ceasing of the former uses be distinguished in words, yet, in truth, they are one; for, the use which is revoked ceases, and the use which ceases is revoked: secondly, although no use ceases until the writing of revocation be sealed and published, and, after the sealing and publication, nothing can be added to it, yet it may well stand with the words of the proviso and the intention of the parties, that the new declaration may be in the same deed; for both being contained in one and the same writing, its operation will be, first, to make a destruction of the former, and then, *eo instanti*, a creation

^a *Digger's case*, 6 Resol. ^b *Fitzwilliam's case*, 6-
 1 Rep. 174; S. C. Moor, Rep. 33, b.
^c *Ibid.* 6 Co. 3a.
 603.

of the new uses; and although these clauses may be contradictory, and *ex diametro pugnarent*, because the one destroys and the other creates, yet the construction of the law (which delights in making reconciliation,) makes a good accord between them. For, to the intent that the new uses may be created, the law adjudges that the clause of destruction shall have the priority, although both be contained in one and the same deed, and took effect by one and the same delivery.

And, where a power of revocation is reserved, the estates, created by the deed in which such power is contained, may be defeated not only by an express revocation, but by a revocation in law; as, where the donee of the power does an act of a nature that is irreconcilable with the existence of the former uses; *quia non refert an quis intentionem suam declarat verbis, an rebus ipsis, vel factis*; as when a man having power to revoke, limits new and other uses; in this case, the limitation of any latter uses which are inconsistent with the former ones, will be construed a revocation of the first uses, although the deed creating the power be not recited or referred to¹ (1). For although there be not any express signification of the purpose or determination to determine the former uses, yet when a person limits new and other uses, he thereby necessarily signifies his purpose to determine and alter the uses before limited.

And although the uses be limited, in the deed creating them, to be revoked by express words, *in totidem verbis*,

¹ *Scroop's case*, 10 Co. W. Jones, 392; S. C. cited 143, b; S. C. 2 Rol. Abr. 1 P. Wms. 162.
263; *Snape v. Turton*, Sir

(1) Constructive revocations seem, however, not to have been allowed of at law, until some time after the statute of uses, for *Scroop's case* was founded only on one authority, namely, the case of *Frampton v. Frampton*, cited in that case, to have been determined Trin. 2 Jac. but of which case I have not met with any report. See *Scroop's case*, 10 Rep. 144; S. C. 2 Rol. Abr. 263; 10 Ja. 1.

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yet any act irreconcilable with those uses, will operate in law as a revocation^a. Therefore, where *D.* conveyed land to trustees to certain uses, with power for *D.* at any time thereafter, by any writing subscribed and sealed by him in the presence of two or more credible witnesses, "in express words," to revoke or make void the estate or use thereby limited; and that then, and from thenceforth, the use and estate thus limited should cease. *D.* by his will, sealed and delivered in the presence of two witnesses, gave and devised the lands for different estates than those limited, but without expressly revoking the former uses; yet it was held to be a revocation, for that, when two acts could not consist together, the latter must be a revocation of the former.

But, with respect to express revocations, there is the same necessity in executing a power of revocation, for attending to the circumstances required by the power, as to the form of the instrument, subscription of witness, &c. as we have before seen there is in executing a power of appointment. For, *per Holt*, "when a man has restrained himself by a particular power, he has no right to dispose of his estate but by exactly pursuing that power, nor will equity enlarge his right. For there was the greatest reason, in this case, that a man should be obliged by the rule of law in a court of equity, because it was a law that he had put upon himself: and that was the equity of the legal obligation, namely, because it was supposed to be made by his own express or implied consent. If a man voluntarily made a settlement to the use of himself for life, and after to other uses, and reserved no power of revocation, he could not revoke this, no, not in equity; and the reason was the same as to a power reserved; for he had no other right to do it but by virtue of the power."

^a *Guy v. Dormer*, Sir T. Raym. 295; but note, this case would have been the same, whether the revocation happened not to be material, as the event of this

and it was as if he did it without a power, unless he made a due use of such a power as he had. Besides, there might be a very good reason for a man to put such restraint upon himself, for a man might know the frailty of his own temper, how apt he might be to be surprised, and prevailed upon to make a precipitate or inconvenient will, settlement or disposition of his estate. Then, to restrain this infirmity which he was conscious of, and to prevent an inconveniency that might arise by his disposing of his estate upon a surprise, he would restrain himself and settle his estate so and so, that, if there were a deliberate intention in him to alter it, he might solemnly execute such intention; he would therefore have so many witnesses, and those of good quality, that, if they found him about any such action, might advise him in it, and prevent any apparent surprise into the doing of any action that might be foolish, rash or prejudicial. For that reason he would bind himself under such and such restraints." And his Lordship said, that a contrary construction would introduce many absurdities; for, first, it would be to set up a power in a court of equity, in direct opposition to the courts of law, and so to let a man loose, in equity, for no other reason but because he had restrained himself at law by a law of his own making.

Thus where *G.* being seised of two several manors, enfeoffed *B.* and *C.* to certain uses, with clause of revocation upon the tender of 40*s.* and that, after such revocation, he might limit to new uses". And the year following, *G.* made the like conveyance of his lands in the county of *S.* to the said persons to the like uses, upon like clause of revocation, upon tender of 40*s.* *G.* afterwards tendered to the said feoffees one sum of forty shillings, to revoke the uses raised upon both the feoffments; but it was resolved, that, by such tender, they were not revoked, but

* *Sir T. Gresham's case*, 429; same point, *Dyer*, 372, 1 *Leon.* 89; *S.C. Moor*, 261, a, pl. 9.

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that the revocation was utterly void ; for two several sums of forty shillings ought to have been tendered, because they were several indentures, and could not be satisfied with one sum. So in the case of *Arundel v. Philpot*, where *M. P.* being a widow, seised of lands, made a settlement, with a power of revocation upon tender of a guinea, and she afterwards made another settlement, but there was no proof of the tender of the guinea ; the Court of Chancery would not interfere to support the revocation, in equity, upon the intention only, without a proof of the due execution^o. So, if the execution of the power of revocation be expressly required to be by deed indented to be enrolled ; no revocation can be effected until the deed be enrolled : for if it should operate as a revocation before the enrolment, the deed, probably, would never be enrolled ; which would be against the words and intent of the creator of such power^p. And, if the donee of a power of revocation require that the instrument, by which he revokes, shall be enrolled in a particular court, it will not take effect, as a revocation of uses under the power, until that be done ; and, accordingly, it was resolved in *Digger's case*, that there was no perfect and complete revocation until the indenture was enrolled in Chancery ; for inasmuch as the indenture of revocation itself limited the revocation to take effect, after the enrolment thereof in the Chancery, there was no perfect revocation, until it was enrolled in that court^q.

If a power of revocation be reserved to be executed conditionally, *ex. gra.* with the consent of a third person, that fact must be clearly proved^r : and therefore, where, on an issue out of Chancery, the plaintiff claimed by a deed of lease and release made by the Earl of Peterborough,

^o *Arundel v. Philpot*, cited 3 Ch. Ca. 70 ; and see Pow. 1 Rep. 173.
^p Pow. 141.

^q 2d Resol. in *Digger's case*, 1 Rep. 173, b.
^r *Lord Mordaunt v. Earl of Peterborough*, 3 Keb. 305.

and sealed by the Earl and his Countess, in which there was a power of revocation, and to which deed there was reason to make her a party to save her jointure; this lease and release was urged to have been a revocation of a former settlement, in which there was a proviso, that the said Earl might, by the consent of the Countess, obtain in writing a revocation in the presence of three witnesses. But it was doubted, that her bare sealing the latter deed was no sufficient assent to make a revocation, unless the latter conveyance had been said to have been by assent of her, or there had been a mention of her assent in any clause thereof, which there was not; and the court, being of that opinion, directed the facts to be found specially, and also that there was no other consent (1).

A power of revocation may be executed by several instruments; as by fine and deed to declare the uses, or any other deeds which, when taken together, may be considered and operate as one assurance*. And such power may also be executed at different times, over different parcels of the estates subjected to the power†.

Accordingly, in *Digges's case*‡, where the power (as to this point) was to revoke, "at any time" during the life of the donee thereof, any of the uses or estates, and to limit new uses; it was resolved, as stated by Lord Coke, that the donee of the power might revoke part at one time, and part at another time, and so of the residue until

* See *Lord Leicester's Ca.* † *Digges's case*, 1 Rep.
1 Vent. 278; Raym. 239. 173, b, 1st Resol.; S. C.

‡ *Sir Richard Lee's case*, Moor, 603.
1 And. 67.

(1) But it seems that the Countess's sealing the deed would, in the preceding case, have been good presumptive evidence, upon which the jury might have found an assent by her to the revocation, if her signature could have been accounted for upon no other ground. Pow. Pow. 297. *Sed quære.*

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he had revoked all: for these words, "at any time," amounted to as much, and were, as if he had said, "from time to time as often as he should think good (1)."

A power of revocation may also be executed conditionally as well as absolutely". Thus where *A.* seised in fee, made a settlement of the estates in question, with power of revocation; and, seven years afterwards, mortgaged the same in fee to one of the remainder-men in the settlement; and the condition of the redemption was, that if the mortgagor or his heirs paid the money at the day, he should have the lands in his former estate: the question was, whether this mortgage was a total revocation, or only *pro tanto*; and the Lord Keeper declared that it was a revocation *pro tanto* only, the mortgagor being to have the lands on payment, as in his former estate; and it was decreed accordingly. But it is to be observed, that Sir Joseph Jekyl, in giving his opinion in the case of Fitzgerald and Lord Fauconberge, said, that he knew of no case but that of a mortgage, wherein equity controlled a power of revocation, and the reason of that case was, because the mortgagor, in equity, continued to be still owner of the

^a *Thorne v. Thorne*, 1 Vern. 141, 182; *S. L. Perkins v. Walker*, 1 Vern. 97.

(1) But as this case is stated in Sir T. Moor's Reports, the resolution was, first, that the words in the proviso, "that it should be lawful for him at any time during his life," &c. should be intended *toties quoties* during his life, and not restrained to one time in his life. Secondly, that the words, "any use or estate of the premises, or any part thereof," should be intended as well one part at one time, as another part at another time, and not be restrained to an election to make a revocation at one time of all or any part, and no revocation afterwards of any other part; in which it seems to concur with the opinion of Anderson, in *Sir Richard Lee's* case, 1 And. 67; and see *Zouch v. Woolston et al.* 2 Burr. 1136; *Hervey v. Hervey*, 1 Atk. 563; *Doe v. Milborne*, 2 Durnf. & E. 721.

estate, it being considered there but as a pledge for the money⁷.

In some cases, however, we have seen, that the Court of Chancery does not consider itself restrained to an observance of the same rule in respect to the strict performance of all incidental circumstances required to exist in the execution of powers of appointment, by which courts of law are bound. These cases are those in which that court regards the end and consideration of the execution of the power, rather than the strict legal requisites annexed to the execution of it in its creation; or in which that court relieves against the circumstances⁸. And the same principles apply with respect to revocations⁹; for we may here recollect, that these powers, arising out of uses, were unknown to the common law previous to the statutes relating thereto, and originally belonged, in point of jurisdiction, to courts of equity only; and that there was, in law, no other mode of reserving an authority over an estate given to another, than by means of a condition: but, when these statutes, and particularly that of 27 Hen. 8, by transferring uses into possession, incorporated the use and the possession together, they became legal estates, and fell under the jurisdiction of courts of law. Now, as conditions which were to defeat estates vested, were considered in courts of law as odious, so, when powers fell under their jurisdiction, they made a distinction between powers of appointment and powers of revocation: and, as the latter were generally annexed to voluntary settlements, and always tended to overthrow and defeat estates raised by the instrument in which they were contained, and whereby they were actually settled by the owner of the inheritance, they in analogy to their rules respecting conditions that went to defeat estates, considered these also as odious; and,

⁷ *Fitzgerald et al. v. Lord Fauconberge et al.* 3 Brown's Parl. Ca. 543; S. C. Fitzgib. 207. ⁸ And see *Burnet v. Holgrave*, 1 Eq. Ca. Abr. 296; and 2 Ves. 642. ⁹ 2 Will. 227; *Ibid.* 490.

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therefore, required that every circumstance, that was appointed to attend the execution of them, should be precisely complied with before they could divest an old estate or create a new one. But as this construction was repugnant to the nature of powers, and, in cases of settlements made for the benefit of children, militated against the rules of equity, which considers children as purchasers, courts of equity seized on this circumstance as a ground to resume their jurisdiction, holding that, in conveyances to uses executed, as well as in common law conveyances, the consideration of any equitable interest in the estate conveyed, still belonged to the courts of equity by virtue of the original jurisdiction which they had, before the making of any of the statutes relating to uses, and which was not taken away by any of them. And thereupon they began to interpose and supply such defects whenever there appeared to be a valuable consideration; as in cases of marriages, jointures, or settlements, or in which there was any other equitable ground for interposition^b.

But a distinction is taken, even in equity, betwixt a non-execution and a defective execution of a power of revocation. For though the court will, under certain circumstances, help the latter, it will never aid the former, because to do this, would be repugnant to the nature of a power, which always leaves it to the free will and election of the party to whom the power is given, whether to execute it or not; for which reason equity will not compel the execution of a power, or construe the act as done, when there is no evidence of the intention of the party to do it^c. Nor will a mere intention to revoke be alone sufficient; and therefore a letter written to a solicitor desiring a deed of revocation to be prepared, accompanied with instructions for the new uses, was held not to amount to a revocation; for, *per* Cowper, Chancellor, a mere endeavour

^b Pow. Pow. 157.

250; same law, *Arundel v.*

^c *Ibid.*; and see *Pigott v. Philpot*, cited 3 Ch. Ca. 70, *Str H. Penrice et us. Com.* and 2 Vern. 69.

to effect a revocation, without any thing done in furtherance of it, and without pursuing the circumstances required by the power, would not amount to a revocation^d. But if the power be executed for a consideration, or if any equitable ground of relief interferes, a court of equity, as hath been said, will supply the omission of any of the formal circumstances required, by the instrument creating the power, to attend the execution of it. Thus a covenant, relating to lands subject to a power, made in consideration of marriage, will operate in equity, as a good revocation of a will previously made in execution of the power, although made in favour of a child. As, where copyhold tenements were surrendered by husband and wife, to the use of the wife for life, and afterwards to such uses as she, by any writing, or by her last will attested by three witnesses, should appoint^e. She accordingly, by a writing purporting to be her last will, and signed by her in the presence of three witnesses, appointed the premises to her daughter in tail. Afterwards, by deed or writing attested by two witnesses only, she covenanted to surrender the premises to the use of her intended husband and herself, and the heirs of her husband; who covenanted to settle an annuity of 30*l.* per annum, on her for life. *Per Curiam*, though a covenant or articles do not, at law, revoke a will, yet, if entered into for a valuable consideration, amounting in that court to a conveyance, there must consequently be an equitable revocation of a will, or of any writing in nature thereof. And it was plain, in the present case, that the writing was intended as a will, and not to divest the wife of her estate during her life, as it must have done had it been an appointment of an use to take effect *in presenti*.

And, in instruments for raising and creating, or the direction of uses and powers^f, as well as in all other modes of assurance, one general rule is to be observed, namely,

^d Comyns, 253.

^e Co. Lit. 49, a.

^f *Cotter v. Lyster*, 2 P. Ws.

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an adherence, in the construction of them, to the intention of the parties, so far as it stands with the rules of law^c; inasmuch as powers reserved to the owner of the estate, have always been liberally expounded so as to answer his intention, as being part of his ancient right and dominion over the estate.

Construction of
powers of revo-
cation.

Where an estate is conveyed to uses with power of revocation, but without a power to limit new uses, no new or other use can be averred or declared under the assurance that creates the power; for a power of revocation only does not imply a power to appoint new uses^d: for, in such case, the uses of the original conveyance are exhausted by the revocation, the power being only to revoke and not to limit new uses: and if, in such case, new uses are declared, they must be limited by deed or fine to take effect out of the interest of the revoker, as they cannot take effect out of the original conveyance^e. For, although a revoker may limit new uses, when there is no express power so to do, yet those new uses cannot take effect as uses springing out of the original conveyance, but must take effect out of the interest of the revoker, as a new limitation of the use; and the reason is, that, the old uses ceasing by the revocation, and there being no express power to declare new uses, the estate out of which the old uses arose becomes free from them; for that estate was only bound by the uses limited thereon with power of revocation, and the consideration extended to those uses only, and consequently, after revocation, it was freed from them: but every power of revocation giving an interest, in the estate out of which the uses arise, to the revoker, he may, upon a consideration, limit new uses to enure out of that interest, though he cannot declare new uses upon the original conveyance: if, therefore, a man make a

^c See 3 Brown's Parl. Ca. Keeper, 1 Chan. Cas. 242. 552—556.

^d Becket's case, Lane, 119;

^e Anon. 1 Stra. 584; *sed contra*, by Finch, Lord and see Pow. Pow. 274.

feoffment, or levy a fine, and declare uses, and reserve a power to revoke them without saying more, he cannot revoke them, and declare new uses under the feoffment or fine; for the use of the feoffment or fine being once declared by the indenture, no other use can be averred or declared thereof, which is not warranted thereby; for a man cannot declare a fine or feoffment to be to new uses, when the uses thereof have been once declared, although the first uses be determined, unless power be reserved to declare new uses; in which case the fine enures to the power. Thus, if a man declare the use of a feoffment or fine to be to one and his heirs, upon condition that he shall pay 40*l.* &c. or until he do such an act, if the first use be determined, the feoffment or fine cannot be declared to be new uses; for all the uses which are to arise out of the feoffment or fine, ought to spring from the first indenture, which testifies the intention of the parties in the making or levying thereof. Upon this ground, the second indenture, in *Becket's* case, and the limitation of new uses thereby, were held to be well warranted by the first indenture; for there was a power reserved therein to revoke and declare new uses. And in respect that the power, in that case, was not a naked power only, but with an interest, the new uses might be upon condition, or upon a power of revocation to determine them; but the declaration of the third uses by a third indenture, after the revocation of the uses limited by the second indenture and re-limitation with power of revocation and to limit new uses, was not warranted by the first or second indenture; for the power in the first indenture was exhausted by the second indenture, and the power in the second indenture was to limit and not to declare, and without such warrant there could be no declaration of any new uses of the first assurance which was not authorized by the first indenture. As, in such case, therefore, if the revoker limit new uses,

j 2 Rep. 76; 9 Ibid. 10, 11.

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not being expressly warranted by his power so to do, or, if warranted, then not exactly pursuant to the terms of the power, such uses cannot enure upon the original conveyance, but must take effect out of his interest; they must, consequently, be limited upon a new grant, or by covenant upon a consideration expressed; the consideration of the original uses not extending to the new uses limited upon the revocation.

Thus, in *Ward v. Lenthall*¹, R. B. having issue only one daughter married to E, levied a fine, and by indenture declared the uses to R. B. and his heirs male, remainder to several of his brothers and the heirs male of their bodies, remainder to the said daughter, &c. And in the indenture there was a power of revocation of those uses, and also a power to declare new uses. An indenture was made accordingly revoking the first uses, in which there was also a power of revocation, but no power to limit new uses. Then a third indenture of revocation, and also declaring new uses was made; which indenture contained a clause, that all other fines afterwards to be levied should enure to those uses. Upon this case it was agreed by the Court, that, if an indenture declared the uses of a fine, and further that it should be lawful to revoke, &c. and to limit new uses, &c. the party might, by such deed, revoke and limit new uses as often as he pleased, and all the estates should arise out of the fine. But if upon any such indenture, wherein he declared new uses and reserved power of revocation, he omitted expressly to reserve a power to limit new uses, he could then only revoke, and could not limit new uses by virtue of the estate raised by the first fine. And thereupon the counsel, in support of the last indenture, showed another fine levied the term after the date thereof, by which it was agreed, that the estates limited by the last indenture were well raised.

Again, where A. suffered a recovery to the use of himself

¹ 1 Sid. 343; and see *Strange*, 584.

for life¹, remainder to *B.* in tail, remainder to *C.* in tail, remainder to *D.* in tail, remainder to *A.* in fee, with power to revoke the three remainders in tail by any writing under his hand and seal: he revoked them within the terms of the power, and, by the same deed, declared new uses in favour of the plaintiff, without any words of conveyance, covenant to stand seised, or consideration expressed. And hereupon the question was, whether this new declaration of uses was good or not? It was insisted in support thereof, that *A.* having revoked, the intermediate remainders, had the whole fee in himself, and might dispose of it as he pleased: and whether it was by the same deed or by a different deed was not material. But it was answered, and resolved by the Court, that true it was he might, by will or any new conveyance, have made such new disposition, and even the said deed would have been sufficient for that purpose, if there had been a new grant, or a new covenant on consideration expressed; but here he had declared new uses as under the recovery, whereas the uses of the recovery were full before, and the power was only to revoke and not to declare new uses.

Questions have arisen, whether a power of revocation is forfeited to the crown by attainder, and whether the crown can perform the condition^m? as to which, a distinction has been taken between powers that are personal and individual, and cannot be performed by any other than the person in whose favour they are created, and those which are not so inseparably annexed to the person but that they may be performed by any other. Powers of the former kind are such as require the revocation to be executed by an act or acts, which can only be performed by the person to whom the execution of the power is delegated. Thus, in a case where Thomas duke of Norfolkⁿ, conveyed lands to the use of himself for life, and afterwards to the

Where powers of revocation forfeited.

¹ *Anon.* Strange, 584. 11, b; S. C. Moor, 303.

^m *Englefield's case*, 7 Rep. ⁿ Cited 7 Rep. 13.

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use of his eldest son in tail, with divers remainders over; with proviso, that if he should be minded to alter and revoke the said uses, and should signify his mind by writing under his proper hand and seal, subscribed by three credible witnesses, that then, &c. Afterwards the Duke was attainted of high treason, and, upon the question, whether this condition was forfeited to, and could be performed by the crown, it was held, that it was not given to the crown by the act of 33 Henry 8, c. 20, because the performance of it was personal and inseparably annexed to the Duke's person: viz. to signify his mind by writing under his own proper hand, which none could do but the Duke himself. Upon which point, all the possessions of the dukedom so conveyed were saved, and not forfeited by the attainder. So, where one, possessed of a long term, assigned it in trust for himself for life, with power for him to make leases, and, after his death, in trust to levy several sums of money for several of his kindred, the remainder in trust for one of his sisters^o; provided that, if he left issue, or had a wife *ensient*, he might dispose of it to his issue and another; nevertheless, if he should be minded to dispose of it otherwise, and declared his mind so to be by writing under his hand and seal, he might so do. He was attainted of treason; and it was adjudged in the Common Pleas that the term was not forfeited: and the judgment was afterwards affirmed on writ of error.

Powers not inseparably annexed to the person, and which may be performed by others, are, where the thing to be done is merely collateral or formal, and does not depend upon any election or act of the mind of the donee of the power^p, as the payment of the money or the like, in which cases it is forfeitable. For when the statute gives the condition to the king, the performance thereof,

^o *Smith v. Wheeler*, 1 Lev. 279; S. C. 1 Vent. 128; ^p *Englefield's case*, 7 Co. 11, b; S. C. Moor, 303. Mod. Rep. 16, 38.

not being personal or inseparable, is also given to the king, as incident to it; for, the performance is the substance and effect of the condition, and the statute puts the king in the place of the person attainted, to do that for the performance of the condition which was feasible, and which was not inseparably annexed to the person of him who was attainted. But, if a power to revoke be upon a collateral act done, as tender of a ring or the like, and the revoker be also restrained to do some special corporal act, so that the condition is restrained to the mind or the hand of the revoker, in such case none can perform the condition, but the person himself in whose behalf it is reserved¹.

Thus, where Sir William Shelley made a conveyance to trustees in fee to the use of himself for life, remainder to his eldest issue male in tail, remainder over: provided that, if Sir William Shelley, at any time during his life, tendered to the feoffees a ring of gold, he the said William Shelley, then declaring and expressing that the tender was with intention to make void the said feoffment, that then the said feoffment should be void, and from thenceforth the feoffees should be seised to the use of William Shelley and his heirs. Afterwards Sir William Shelley was attainted of treason, and all his lands were forfeited to the queen. Then the queen commissioned Sir John Fortescue to tender the ring, &c. according to the proviso, which he did. But it was held that the power of revocation was not well performed by the tender made by Sir John Fortescue by command of the queen; for, though, if there had been nothing more than a tender of the ring required, the condition had been forfeited. Yet, in this case, a special declaration was required in another manner than the law annexed it, and for that reason, it became personal to Sir William Shelley, and was not forfeited.

¹ *Per* Manwood, in *Englefield's* case, Moor, 336. and 2 Rol. Rep. 393; Jones, 134; Noy, 79; and see Pow.

² *Hardwin v. Warner*, Palmer, 429; S. C. Latch, 107, Pow. 303.

REVOCATIONS.

And it was held in *Digger's case*^{*}, that if one have power to revoke by deed, or tender, or other ceremony, and he execute the ceremony, the uses or estates cease without claim or entry, if the party who hath the power be tenant of the freehold: first, because he himself, being tenant for life of the land, cannot enter upon himself; and, claim he need not, when he himself is seised of the land, and makes an express act of revocation, which is as strong as any claim can be: secondly, because the conditional words determine the uses by limitation; for the sense of a limitation concurs with the intent of the party who has appointed a remainder over, whereas a condition is only to reduce a thing back to the donor; thirdly, because one quality of an use is to cease without entry or claim.

So, in *Englefield's case*, it was held that the queen had determined the use by tender of the ring, without office found; because, says Manwood, Chief Baron, offices are to find titles precedent to the offices, not those that are instant titles, as alienations, mortmains, and such like before office[†].

And if lands, subject to a power of revocation, be vested in the crown, they are immediately divested without office, by execution of the power; unless the condition of the revocation be by an act to be performed to the crown. Thus, where conusee of a fine made a lease for life, by deed enrolled, to a stranger, with remainder to the queen, upon condition to be void upon tender of money to the tenant for life: it was agreed, *per Curiam*, that the tender divested the remainder, without office, because the condition was not performable to the queen, but to the tenant for life[‡]. So, it was resolved in *Snape v. Turton*[§], that, in that case, the grant of the reversion by deed enrolled was a good revocation, and revoked the uses limited in remainder to the king, without office or any other act.

^{*} 1 Rep. 174.

[†] Moor, 612; Co. Lit. 546.

215, a. 237, a.

[‡] Moor, 337.

[§] *Hemley v. Brice*, Moor,

[¶] W. Jones, 393; 3d Resol.

BOOK III.

PART IV.

OF ASSURANCES BY MATTER OF RECORD⁽¹⁾.

CHAR. I.

OF A FINE.

IN treating of a fine as a common assurance of real property, I shall consider, FINES.

I. THE NATURE AND ORIGIN OF FINES.

II. THE SEVERAL SORTS OF FINES.

III. THE COMPONENT PARTS OF A FINE.

IV. WHAT PERSONS MAY LEVY A FINE, AND TO WHOM.

V. OF WHAT THINGS A FINE MAY BE LEVIED, AND BY WHAT DESCRIPTION.

VI. IN WHAT COURT AND BEFORE WHOM THE ACKNOWLEDGMENT OF A FINE MAY BE TAKEN.

VII. OF THE EFFECT AND OPERATION OF A FINE.

VIII. OF THE MEANS BY WHICH A FINE MAY BE AVOIDED.

(1) For a deeper investigation concerning the law of assurances of record than can be comprised in the present work, the student is particularly referred to *Sheppard's "Practical Counsellor,"* a book which merits greater consideration than it appears to have hitherto received. In the same book is also contained some valuable learning relative to usurious contracts and fraudulent conveyances.

FINES.

I. OF THE NATURE AND ORIGIN OF ASSURANCES BY FINE.

A FINE may be defined to be an amicable composition or agreement of a suit respecting real property, either actual or fictitious, by leave of the king or his justices; by which the land in question is acknowledged to be the right of one of the parties^a, and is so called either on account of its end and effect being to put an end or final period to all litigation, whether present or future, concerning the subject in dispute^b; or perhaps, on account of the fine paid to the king upon the consummation of the agreement.

Fines have been generally deemed to have been coeval with the first rudiments of the law itself, and are spoken of by Glanvil^c, and Bracton^d, in the reigns of Hen. 2, and Hen. 3, as things then well known and long established^e. But though fines are evidently of very high antiquity, it does not appear certain that they were in use in this country earlier than the reign of Stephen, the immediate predecessor of Hen. 2^f.

This conveyance by fine, is esteemed an assurance of greater security than a feoffment, or the investiture by livery, for lands acquired in this manner being supposed to be recovered by sentence of a court of justice, it is held to be of the same nature and of equal force with the judgment of a court of justice; and the possession which was formerly delivered by the sheriff, in pursuance of a writ directed to him for that purpose, was equivalent to the notoriety of livery^g. It has also the constant and indisputable credit of a court of record to protect and

^a Co. Lit. 120.

^c 2 Blac. Com. 349; Co.

^b Glanv. l. 8, c. 3; Brac. Read. 1; Plowd. 368.

^f See Cru. Fin. 10.

^e Lib. 8, c. 1.

^g Cru. Fin. 6.

^d Lib. 5, s. 5, c. 28.

support it, being enrolled amongst the records of the court, where it is preserved by a public officer, by which means it was not so liable to be lost or defaced as a charter of feoffment¹, and being a record, will at all times prove itself; this farther security, moreover, attends it, that it not only transfers the right of the vëndor, and all claiming under him, but likewise extinguishes the right of all others who omit to make their claim in due time (1).

Fines were originally, however, invented and allowed of for different purposes than they are now applied to; they being at first no more than a friendly composition and determination of the matters in debate between the demandant and tenant in the lord's court; a way of composing differences which was easily admitted in those days, when the suitors of the court, who were judges of all suits, were by these amicable compositions the sooner dismissed from their attendance at the court; nor did the lord of the manor suffer by them, because on these agreements, the parties litigating paid him a fine for his *congé d'accorder*, or leave to compromise, as they do to the king at this day, which was equivalent to the amercements, which were paid him in adversary suits (2).

But from an observation of the peculiar benefit and security from fines, and from the countenance and encouragement they received from the courts of justice, men began to bind themselves by covenants, to commence

¹ See Dugd. Orig. Jur. 92.

(1) Spelman describes a fine to be *solemnis ritus transferendorum prädiorum in Curia Regis civilium causarum, quo nihil sanctius vel augustius ad alienationes et hereditates stabiliendas*. Spel. Glos. voc. *Finis*.

(2) In the times of strict feudal jurisprudence, the vassal could not abandon a suit commenced in the court of his lord, without leave, lest the lord should be deprived of his fees and perquisites for deciding the cause. See 1 Rob. Gav. ch. v. p. 31.

FINES.

actions and to compose their differences for the express purpose of transferring their lands from one to another by the sentence of a court of justice; and they were the more easily drawn into this amicable way, because it was not attended with the usual expenses of adversary suits, which being generally prosecuted with warmth and animosity, by the parties litigating, commonly involved one or both parties in difficulties, which such friendly compositions were free from (1); and the judges, considering these agreements as the public acts of the court, allowed them the same sanction with their own judgments; and hence they came to be improved by the sanction and assistance of the legislature, into common assurances of the realm.

II. OF THE SEVERAL KINDS OF FINES.

FINES are of four kinds; that is to say, (according to the style of our old law French) 1. A *fine sur connissance de droit come ceo que il a de son done*, or a fine upon acknowledgment of the right of the connusee, as that which he has of the gift of the donor. 2. *Fines sur connissance de droit tantum*, or fines upon acknowledgment of right merely, without the circumstance of a preceding gift from the donor. 3. *Fines sur concessit*, or fines upon a simple grant. And, 4. *Fines sur done, grant et render*; by which, after an acknowledgment of the right and gift, something is rendered back to the donor.

Fine sur connissance de droit come ceo, &c.

1. Of a *fine sur connissance de droit come ceo, &c.* The *fine come ceo, &c.* is most commonly used of any, being the best and surest kind of fine for a purchaser; for thereby

(1) Fines were not only thought useful to private or particular persons, but such as establish the public peace of the kingdom; and Spelman says, *Fines hujusmodi maxime placere quod propter testationis magnificentiam, non solum ad stabiliendas transactiones sed ad vincendos lites maxime valebant; ideoque ab emptoribus terrarum tanquam sacra anchora culta et admirata.* Spelm. Gloss. verb. *Fineis.*

the deforciant, in order to keep his covenant with the plaintiff, of conveying to him the lands in question, and at the same time to avoid the formality of an actual feoffment and livery, acknowledges in court a former feoffment, or gift in possession, to have been made by him to the plaintiff.

This fine is therefore sometimes said to be a feoffment of record¹; the livery, thus acknowledged in record, being equivalent to an actual livery: so that this assurance is rather a confession of a former conveyance, than a conveyance now originally made; for the deforciant or conusor acknowledges the right to be in the plaintiff or conusee as that which he has as the proper gift of himself the conusor². And it is to be observed, that this fine and that *de droit tantum*, convey a fee-simple to the conusee without words of inheritance; for when the conusor acknowledges the land to be the right of the conusee, it is repugnant and contradictory to his own acknowledgment, to claim any right or interest in the land in reversion or remainder; besides, in every judgment, a fee-simple was recovered, and the conusance coming in lieu of the judgment, must necessarily import as much, unless, indeed, it is qualified by other express acknowledgments of the parties, in which case it will pass no greater estate than is there expressed. If, therefore, the limitation be expressly to the conusee and the heirs of his body, the fine passes only an estate-tail; for it would be absurd to give more against so solemn a declaration of the parties¹, and the preceding gift of the conusor may as well have been in tail or for life, as in fee.

The form of the fine comes off in this: "and the agreement is such, to wit, that the aforesaid A. (the conusor) has acknowledged the aforesaid messuages, &c. to be the

¹ Co. Lit. 50, b; but see *Hunt v. Bourne*, 1 Salk. 340.

² 2 Blac. Com. 332.

¹ Co. Reading, 4; 1 Salk.

340.

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right of him the said *B.* (the conusee) as those which the said *B.* hath of the gift of the said *A.* and those he hath remised and quit-claimed from him the said *A.* and his heirs to the aforesaid *B.* and his heirs for ever."

Upon this species of fine, when it passes a fee, the conusor cannot reserve a rent, because the conusance supposing a precedent gift, he cannot charge the inheritance which he has given entirely away; for the *reddendum* comes too late when the fine has already acknowledged an absolute precedent gift, without any such reservation^a. But if the conusance be only of an estate for life, the conusor may reserve a rent, because not having acknowledged the entire and absolute property to be in the conusee, there is no repugnancy in reserving a rent out of it; and he may reserve a clause of distress; for that is a remedy the law gives for the recovery of all rent-services, which this must be, being incident to the reversion^a.

Thus where *A.* made a lease for life, and afterwards granted the reversion by fine to *B.* for life, the remainder in tail, in a *quid juris clamat* against the lessee, he would have surrendered to the conusee, reserving a rent during his life, but the Court refused it; for had this surrender, with the reservation of the rent, been admitted, it might have happened that the rent would not continue according to the limitation of the fine; for if the grantee of the reversion died before the tenant for life, the remainder-man in tail would hold the land discharged; and the tenant for life could not enjoy the rent as long as the fine gave it; but if in this case the lessee had surrendered to the grantee for his own life, with a reservation of a rent, this might have been admitted, for this is no absolute surrender; and each party may enjoy what the fine gave him, according to the several limitations thereof^b.

^a Bro. tit. Fines, 30; 2 Rol. Abr. 18.

^a Co. Reading, 5; 2 Rol. Abr. 18.

^b Co. Reading, 5.

It is likewise observable, upon this fine, that it cannot be levied to two persons and their heirs, unless where the land is gavelkind, and belongs to all the sons²; for the end of fines being not only to settle the possession of the land for the present, but for ever, the admittance of such a fine would not answer this purpose; for besides the uncertainty as to which of the conusees may survive and enjoy the land, the fine itself cannot operate according to the limitation; for the survivor, by the privilege of joint-tenancy, will enjoy the whole, and for ever exclude the heirs of the other conusee; the fine being, moreover, equivalent to a judgment, it must decide and settle the right of the fee (1). Nor, unless in a like case, ought a warranty to be allowed in a fine from two persons and their heirs³. For the same reason the Judges will not, or at least ought not, to admit of a fine upon condition, because such a fine does not positively determine and settle the right of the fee, it being uncertain whether the conusee will enjoy the land according to the fine, since that depends upon the performance or non-performance of the condition; if, however, such fines be admitted by the Judges, they are valid and shall stand, the rule, *quod fieri non debet, factum valet*, obtaining in this case; because fines being made upon the express agreement and acknowledgment of the parties, it were to trifle with the authority of the King's Courts, which ought ever to be preserved sacred, to suffer either party to recede from his contract, after his final composition acknowledged on record, and received in the most solemn manner by the sanction and judgment of a court of justice⁴.

² Rob. Gav. 132.

² Rol. Abr. 18; Bro. tit.

³ Co. Read. 3; Rob. Gav. 132.

Fines, 5; Co. Reading, 5;

⁴ Reev. 336; 12 Co. 126;

⁵ Co. 38, b; Tye's case; Plow. 34.

(1) But a fine of lands may be granted to two and the heirs of one of them, because in this case all things will continue as the fine has settled them. Bro. tit. Fines, 65.

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2. A fine *sur consauance de droit tantum*, or upon acknowledgment of the right merely, without the circumstance of a preceding gift from the conusor, is commonly used to pass a reversionary interest which is in the conusor; for of such reversions there can be no feoffment, or donation with livery supposed; as the possession during the particular estate belongs to a third person^a. It is worded in this manner: "that the conusor acknowledges the right to be in the conusee; and grants for himself and his heirs, that the reversion, after the particular estate determines, shall go to the conusee^b."

This seems to be the most ancient species of fine, for the conusee being in the place of the judgment, which was always executory in adversary suits, the demandant was obliged to follow the rules of the law, and sue out execution; but in time, when fines became the common way of conveying lands, the purchaser, to prevent the trouble of suing out execution, had seisin given him by livery in the country, and for his further assurance obliged the vendor, by covenant, to levy a fine; and thus the fine *sur consauance de droit come ceo, &c.* came in use, which supposes a precedent gift, by which the conusee was put into possession, and consequently there needed no execution of what he had already.

This fine may also be used by a tenant for life in order to make a surrender of his life estate to the remainder-man or reversioner, in which case it is called a fine *sur surrender*^c. The form is, however, the same as the common fine *sur consauance de droit tantum*, only that the clause of warranty is omitted.

Thus, if there be lessee for life, the remainder for life, and the lessee levy a fine *sur consauance de droit tantum* to him in remainder, this enures by way of surrender, because by this fine he only acknowledges all the right he

^a Moor, 629.

^b West. Symb. 2.

^c See Shep. Prac. Couns.

5.

has in the land to belong to him in remainder; but if the lessee had levied a fine *sur consance de droit come ceo*, &c. to him in remainder, it had been a forfeiture of both their estates, and he in reversion might enter immediately; and the reason of the difference is this, the fine *sur consance de droit come ceo*, &c. always grasps a fee-simple, which passes by the precedent gift as the fine supposes; but the fine *sur consance de droit tantum* only conveys all his right, which is intended all he can lawfully pass away^a.

3. Of a fine *sur concessit*. This fine is where the conusor, in order to make an end of disputes, though he acknowledges no precedent right, yet grants to the conusee an estate *de novo*, usually for life or years, by way of supposed composition. And this may be done, reserving a rent, or the like; for it operates as a new grant^b.

This species of fine runs thus: "and the agreement is such, to wit, that the aforesaid *A.* has granted to the said *B.* the aforesaid tenements, &c. to hold, &c."^c

4. Of the fine *sur done, grant et render*. A fine *sur done, grant et render*, is a double fine, comprehending the fine *sur consance de droit come ceo*, &c. and the fine *sur concessit*, and may be used to create particular limitations of estate; whereas the fine *sur consance de droit come ceo*, &c. conveys nothing but an absolute estate, either of inheritance or at least of freehold^d. In the fine *sur done*, the conusee, after the right is acknowledged to be in him, grants back again, or renders to the conusor, or perhaps to a stranger, either the land itself, or some rent, common or other thing out of it, or some other estate in the premises^e.

Thus, where *C.* was seised in fee as heir of the part of the mother, and he and his wife levied a fine to *A.* and *B.* with warranty, and *A.* and *B.* by the same fine granted

^a Co. Read. 5.

^b Salk. 340.

^c West. Sym. 2.

^d Shep. Prac. Couns. c. 2,

^e Shep. Prac. Couns. c. 2, s. 3.

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and rendered to the husband and wife in tail, remainder to the heirs of the husband; though it was urged, that the seisin of the conusee was fictitious, and that nothing was allowed by the fine, yet resolved, that the conusee was more than a bare instrument, and that the estate was once in him; and that the fine and render is a conveyance at common law, and the render makes the conusor a new purchaser, as much as a feoffment and re-enfeoffment at common law^c. But, in general, as has been before observed, the first species of fine *sur conusance de droit come ceo, &c.* is the most used, as it conveys a clean and absolute freehold, and gives the conusee a seisin in law without any actual livery^d.

The form of the fine is thus; viz. first the *done*, as in the fine *sur conusance de droit come ceo, &c.* "and the agreement is such, to wit, that the aforesaid *A.* hath acknowledged the aforesaid messuages, &c. to be the right of him the said *B.* as those which the said *B.* hath of the *gift* of the said *A.* and those he hath remised and quit-claimed from himself the said *A.* and his heirs for ever;" and then follows the clause of *grant and render*, "and for this acknowledgment, &c. the said *B.* hath *granted* to the said *A.* the aforesaid messuages, &c. and this he has *rendered* to him to hold the said messuages, &c. to the said *A.* and the heirs of his body," or the like^e.

With respect to this species of fine, it is to be observed that the *render* must be of the same lands which are demanded in the original writ, or of something issuing out of such lands, and to some person named in the writ, because the Court can determine the right of the parties with respect to that only about which they are contending, namely, that which is mentioned in the original writ^f.

This fine being chiefly used to create particular limita-

^c *Price v. Langford*, Salk. 337, pl. 1.

² Blac. Com. 352.

^e Shep. Prac. Couns. c. 2, s. 2.

^f Co. Read. 6, 11; 2 Rol. Abr. 15, 16.

tions of estates, is considered more in the nature of a private conveyance or deed between the parties than as a judgment given in an adversary suit, and receives therefore a more liberal construction than other fines, and need not have such a precise form as other judgments^a.

Fines are moreover distinguished into single or double fines; fines at common law, and fines by statute; and fines executory and executed.

Single and
double fines.

A fine is said to be single where an estate is granted by the conusor to the conusee without any thing being rendered back by the conusee to the conusor^b. But when either the land itself, or some estate therein, or some rent, common or other thing out of the land, is rendered back to the conusor, it is called a double fine. This is the case of fines limited in pursuance of marriage settlements to the use of the conusor for life, remainder to the wife for life, &c. or reserving a rent thereout to her for life by way of jointure; and these remainders may be to strangers not named in the writ of covenant^c.

Fines at common law are those which are levied after the manner in which fines were levied before the statute of 4 Hen. 7, upon which no proclamation was made, and which are still sometimes levied where its end is merely to extinguish the right of the conusor without affecting ulterior limitations, estates or interests. Statute fines are those which are levied with proclamations, as required in 4 Hen. 7, c. 24, which, on account of their greater force and efficacy in barring the rights as well of parties and privies as strangers to the fine, are now in the most general use; indeed every fine is, in pleading, presumed to be of this kind till it be shown to be otherwise^d.

Fines, moreover, whether single or double, or with or without proclamations, are either executed or executory.

Fines executory
and executed.

^a See 5 Co. 3; Shep. Touch. 74.

^b Ibid.

^c Ibid.; 2 Croke, 692.

^d Shep. Prac. Couns. c. 2, s. 3.

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A fine executed is that which, from the force of its operation, gives an immediate legal possession to the conusee, so that he needs no writ of *habere facias seisinam* or other means to execute it; of this sort is the fine *sur consueance de droit come ceo que il ad de son done*, because this fine, as the form of it imports, always supposes a precedent feoffment or gift of the thing of which the fine is levied, and which the intent of the fine is only to corroborate, confirm or strengthen; of the same kind also are fines *sur release*, *sur confirmation*, or *sur surrender*, and for the same reason¹. An executory fine is that which transfers no legal possession, nor vests any estate in the conusee till executed by entry or action; of this sort is the fine *sur consueance de droit tantum*, where the conusee has no freehold in him at the time, and so of a fine *sur concessit*, or *sur done grant et render* (at least as far as concerns the *render*) all which fines, unless made to those who are in possession of the land at the time, require an actual entry, or writ of seisin, as the case may be, by the conusee, in order to obtain possession. If, however, the conusee be in actual possession of the thing of which such executory fine is levied, then no writ of execution is requisite to put him in possession, as the fine will in such case enure by way of extinguishment of the right of the conusor without affecting the estate or right of the conusee².

III. OF THE SEVERAL PARTS OF A FINE, AND THEIR RESPECTIVE OPERATIONS.

THE parts of which a fine, as it is required to be levied since the statute *de modo levandi fines*³, is composed, are, 1. The original writ: 2. The *licentia concordandi*: 3. The concord itself: 4. The note or abstract; and 5. The foot or conclusion.

¹ Shep. Prac. Couns. c. 2, s. 3; 3 Co. 513.

² Shep. Prac. Couns. c. 2,

s. 3.

³ 18 Ed. 1, stat. 4.

A fine, we have seen, was in its original, founded on an actual suit commenced at law for the recovery of lands or other hereditaments; it is thus managed; the party to whom the land is to be conveyed or assured, commences an action or suit at law against the other; generally an action of covenant, by suing out a writ, or *præcipe*, called a writ of covenant, the foundation of which is a supposed agreement or covenant, that the one shall convey the lands to the other, on the breach of which agreement the action is brought. On this writ there is due to the king, by ancient prerogative, a primer fine, or a noble for every five marks of land sued for; that is, one-tenth of the annual value^o.

The first part of a fine, therefore, is the original writ, without which the fine is erroneous, and may be reversed for error, this being absolutely necessary to bring the parties within the jurisdiction of the court^p; and though the original is generally a writ of covenant, yet fines may be taken on all writs in which lands are demanded, or are to be charged, or which in any manner relate to them, for the law having provided different remedies for the several grievances of the subject, it was but reasonable in the judges to allow of these compositions, whatever method the injured person took to recover his right; and therefore a fine may be levied on a writ of right close, a writ of mesne, of *warrantia chartæ*, or *de consuetudinibus et servitiis*, a writ of right of advowson, or in any other real action^q; though not in an original in a personal action; and the common writ of covenant, on which a fine is levied, is not a personal but a real action; for though it is to have damages for breach of covenant, as in personal actions, yet it is to have an execution and performance of the covenants^r. The practice, however, now is for the

^o 2 Inst. 11.

^q Finch. Law, 278; Booth,

^p Co. Reading, 3, 10; 247; Mad. 15-

Plow. 392; 2 Rol. Abr. 14;

^r Salk. 340, resolved *per*

2 Inst. 510; 5 Co. 38.

Curiam.

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conusor to make the conusance, and acknowledge the fine, before any original sued out; and this has so far obtained, that the Judges have permitted such fines to stand, though the conusor died before the writ of covenant was taken out; but in these cases the originals were sued out, and made returnable, as of a term preceding the conusance, for they are still necessary to make the fine a perfect and complete conveyance, though for the greater expedition they have allowed of this variation from the ancient course^{*}; and so notwithstanding the action is now become a fictitious proceeding only, yet the proper forms and other requisites in a real action for the recovery of lands must be adhered to (1).

If, therefore, in a *warrantia chartæ* against *B.* to warrant one acre, he levies a fine of that acre and another, the fine operates to convey only his right in that acre which he was called to defend, for the other was not mentioned in the

^{*} *Farmer's case*, Hob. 330; 2 Vent. 47.

(1) The Judges will in some cases, however, allow of amendments to be made when any error has happened by mistake or accident, as where the writ of covenant was dated on a day subsequent to the day of return. See *Gage's case*, 5 Rep. 45, b; and Sir Wm. Blackstone's observations in *Lindsay v. Gray*, 2 Blac. Rep. 1013; but see also *Pembroke v. Jefferys*, 1 Salk. 52; Ca. T. Talb. 59, where it was held by the Judges that the writ of covenant being an original writ, was not amendable either by the common law or by statute, and that *Gage's case* was misreported and not law. So it will permit amendments to be made in the entry of the king's silver, or of the proclamations, or in the description of the lands; see *post*, and Cru. 145. But where a fine was, by mistake, recorded of a wrong term, the court would not suffer it to be altered and recorded of another term; for, *per Cur.* this would be not to amend a fine, but to make a new one; *Heath v. Wilmot*, 2 Black. Rep. 778. Nor will the court allow of a change to be made in the christian name of any of the parties; *Dixon v. Lawson*, 2 Black. Rep. 816.

original¹. So, if a writ of covenant be brought *de terris* (or arable land,) and the defendant make consuance of pasture, meadow or wood, this fine is not good, nor *à contra*; for these being of a different nature from ploughed land, (which *terra* properly implies,) are not contained in the writ, and consequently there does not appear to the court any contention about them².

And so, if the consuance be of the manor of Dale, the conusee cannot make a render of the manor of Sale; or if the consuance be of the third part, the render cannot be of the whole; because the court can determine the right only of that about which the parties contend, and which the conusee demanded in his original; but if the conusor acknowledges all his right, &c. to the demandant, for which consuance he grants and renders the land to the conusor for life; or if he grant a common in the land, or so many loads of wood off the land, this is a good fine; because the determination is wholly concerning the thing in dispute, one party taking the property, and the other a profit arising out of it, all which is comprehended in the original writ³.

So if the grant and render be of a rent *de novo*, this will be good; because the rent issuing out of the land is implied in a demand of the land; and, consequently, the concord and agreement of the parties is received and allowed for that only which was in litigation⁴. And so, if the writ of covenant be of land, he may grant the reversion⁵.

And as nothing can pass by the fine but what is expressed or implied in the covenant, so no one can take an immediate estate by it who is not mentioned in the writ of covenant, because none can have any benefit from the judgment of the court who is not judicially before it, and

¹ Co. Reading, 10; 2 Rol. Abr. 16.

² 2 Rol. Abr. 15, 16.

³ 2 Rol. Abr. 15; Co.

⁴ 2 Inst. 514; Co. Lit. 4, a; Reading, 11; 2 Inst. 514.

2 Rol. Abr. 16.

⁵ 2 Rol. Abr. 16.

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sues for it. A grant and render may, however, be made to a stranger in *remainder*, because the render being only a consideration for the conusance, a remainder limited to a stranger may be as much a consideration to the conusor, as if the whole estate had been given to himself: but there must be an immediate estate given back to the conusor, because the render *ex vi termini* implies that it must return to him^a. And so if a *præcipe* be brought against a tenant for life, and upon his default the reversioner is received, he may levy a fine of his reversion to the demandant, although he is not named in the original writ^b. So likewise, if a fine be levied by a vouchee to the demandant, or by a demandant to the vouchee, it will be good, although a fine levied by a vouchee to a stranger would be void^c. And the reason is, that a reversioner and a vouchee are allowed by the court to come in the place of the tenant against whom the *præcipe* was originally brought, and having thus become parties to the suit, they are bound by the judgment as much as if they had been named in the writ^d.

Again, if the lands be situated in different counties, several writs of covenants must be brought against the conusor as in other real actions; but they may be all comprised in the same fine^e.

Licentia concordandi.

The suit being thus commenced, then follows the *licentia concordandi*, or leave to compromise the suit. For, as soon as the action is brought, the defendant, knowing himself to be in the wrong, is supposed to make overtures of peace and accommodation to the plaintiff; who, accepting them, but having, upon suing out the writ, given pledges to prosecute his suit, which he endangers if he now deserts it

^a Co. Reading, 8; 2 Inst. Rol. Abr. 13; Bro. 105; 514; Bro. tit. Fines, 111. 2 Inst. 514.
But if a writ of covenant be brought against *B.* who
^b Co. Read. 11.
vouches, *C.* the vouchee
^c 3 Co. 29, b.
may make conusance; 2
^d Cru. 37.
^e Dyer, 227; 2 Inst. 512.

without license, he therefore applies to the court for leave to make the matter up. This leave is readily granted, but for it there is also another fine due to the king by his prerogative, which is an ancient revenue of the crown, and is called the king's silver, or sometimes the post fine, with respect to the primer fine before-mentioned; and is as much as the primer fine, and half as much more, or ten shillings for every five marks of land; that is, three twentieths of the supposed annual value^f.

When the parties are judicially before the court by original, the counsel for the conusee appears with the *præcipe* and concord, which is in nature of a declaration, setting forth the conusance which ought to be made by the tenant in the writ, after his appearance is recorded^g; then follows his conusance, which is no more than an acknowledgment, that the manor, or other lands, &c. contained in the writ, belong of right to the demandant, as land which he hath of the gift of the tenant, with a general release and warranty to the conusee and his heirs. When this conusance was taken, they went originally to the treasury, but now, by the 5 Hen. 4, c. 14, they stop with the *custos brevium*, who records it; that statute providing, that all the parts of the fine shall remain in the safe custody of the chief clerk of the C. B. before the chirographer has them out of court; the design of the act being thereby to prevent the inconvenience which frequently happened by the embezzlement of fines, when they laid only in the hands of the treasurer and chirographer, either by their connivance or negligence^h.

This fine, viz. the king's silver, is entered on the writ of covenant, and gives it the force and effect of a fine, and is granted to the king *pro licentia concordandi*, or *congé d'accorder*, in compensation of the amercements and other fines which became due on judgments and nonsuits in

^f 5 Co. 39; 2 Inst. 511.

^g Co. Reading, 3.

^h 5 Hen. 4, c. 14; 5 Co.

39, b; 2 Sid. 55.

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adverse suits¹ (1); this is always paid by him who takes the fee-simple by the fine, and on the entry of it on the covenant, the sum given is expressed, together with the plea, and between whom, with mention of the land for which it is given (2).

From the entry of this the fine is obligatory, and begins to operate; and thenceforth the fine shall stand, though either party die before the other parts are recorded (3). And though the conusor be an infant, the court cannot stay the passing of the fine: all they can do in such case is, to assign the infant a guardian, with instructions to bring a writ of error to reverse it^k.

But if the conusor dies before the king's silver be entered^l, the fine is voidable, and may be reversed by writ of error; because this being given *pro licentia concordandi*, the agreement of the parties is not to be admitted as the judgment of the court till it be paid and entered, and consequently, if the conusor dies before that be done, the fine is erroneous, as a judgment given in an adversary suit after

¹ 2 Inst. 511; 5 Co. 39.

¹ 3 Mod. 140.

^k Ibid.; Dyer, 220; *Petty's* case, 1 Freem. 78.

(1) Formerly the post fine, or king's silver, was paid at the king's silver-office; but it is now paid at the alienation-office, by the stat. 32 Geo. 2. c. 14.

(2) And if any mistake be made in the entry of the king's silver, the court will allow it to be amended. *Bohun's* case, 5 Co. 43.

(3) When a year and a day has elapsed from the date of the caption, or acknowledgment of a fine, without entering the king's silver, an affidavit must be made, that all those who part with any interest by the fine are still living, otherwise the king's silver will not be received. And now that the king's silver is paid at the alienation-office, if a year elapse before the fine is carried to the king's silver-office, an affidavit must be made, that the parties were alive when the king's silver was paid. Barnes, 215; Cruise on Fines, 25.

the death of one of the litigating parties. But this is to be understood, where it appears by the record itself, that the king's silver was not paid till after the death of the conusor; for where, after the conusance made, the conusor dies before the king's silver is paid, and after his death the silver is paid, and entered on a writ of covenant returnable the term preceding his death, the fine will be good; for where there does not appear an error on the face of the record, the Judges, in favour to fines, which so much strengthen mens titles, and quiet their possessions, have always supported them, and will not therefore suffer the entering the king's silver, after the parties death, to be examined, when it appears by the record itself, that the fine was completed, as a fine of the term preceding the death of the conusor^m.

Next comes the *concord*, or agreement itself, after leave Concord. obtained from the court; which is usually an acknowledgment from the deforciant (or those who keep the other out of possession), that the lands in question are the right of the complainants (1). And from this acknowledgment, or recognition of right, the party levying the fine is called the conusor, and he to whom it is levied, the conusee.

^m *Farmer's case*, 2 Inst. 218; *Ball v. Cock*, 3 Mod. 511; 2 Vent. 47; Hob. 330; 140; *Harmes v. Miccle-Barber v. Nunn*, Barnes, *thwaite*, Barnes, 214; Cru. 26.

(1) Although the lands be situated in different counties, they may be comprised in the same fine or concord, so that several writs of covenants be sued out for them; 2 Inst. 512; Dyer, 227. And formerly lands of different persons (as of several vendors) were allowed to be comprised in the same concord, each vendor warranting against himself and his own heirs; but this practice tending to deprive the king of his fines, and the officers of their customary fees, no more than one demandant and one deforciant is now permitted to be included in the same writ, except in the case of coparceners, joint-tenants, and tenants in common, unless where the value of the lands all together do not exceed 200*l*. Wils. 47; Cru. 39.

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This acknowledgment must be made either openly in the court of Common Pleas, or before the lord chief justice of that court; or else before one of the judges of that court, or two or more commissioners in the country, empowered by a special authority called a writ of *dedimus potestatem*; which judges and commissioners are bound by statute 18 Edw. 1, st. 4, to take care that the conusors be of full age, sound memory, and out of prison. And if there be any feme covert among the conusors, she is privately examined whether she does it willingly and freely, or by compulsion of her husband^a.

By these acts all the essential parts of a fine are completed: and, if the conusor dies the next moment after the fine is acknowledged, provided it be subsequent to the day on which the writ is made returnable^b, still the fine shall be carried on in all its remaining parts: if, therefore, after the concord is acknowledged in court, where there are two or more conusors, and one of them die, the conusee may proceed with the fine against the survivor^c; and when completed it has effect and binds the right of the parties from the day of the return of the writ of covenant^d.

Note of the fine.

Next follows the note of the fine, which is no more than an abstract of the writ of covenant and the concord, being a docket taken by the chirographer, from which he forms the chirograph, or indentures, which are delivered to the party to whom the conusance was made; and when this is done, the fine is said to be engrossed^e. It must then, by 5 Hen. 4, c. 14, be enrolled of record in the proper office. A fine may however be engrossed at any time after it is levied^f; and though it be not engrossed at all, it is not material^g.

^a 2 Blac. Com. 350.

^b Com. 71; Cru. 58.

^c *Lloyd v. Say and Seal*, Salk. 341, pl. 7; *Ersfield's case*, Hob. 329; *Cotton v. Baylie*, Barnes, 215.

^d Jenk. 250; 3 P. Wms.

170, n; 1 Bur. 711; 1 Cru. 58.

^e 5 Co. 39; 2 Inst. 468; F. N. B. 147.

^f Leon. 96; Dyer, 254, a.

^g Co. Read. 1.

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Foot of the fine.

The fifth and last part of a fine is the foot or conclusion, which is usually called the chirograph or indenture of fines, beginning *hac est finalis concordia*, &c. this comprises the whole matter of the fine, noticing the parties names, the time and place of its being levied, and the lands, &c. intended to be bound by it. Of this transcripts or engrossments are made and indented by the chirographer, and delivered to the conusor and conusee², which are admitted as evidence in all courts of the fine being levied; for the chirographer, being an officer appointed by the law for the purpose of transcribing fines from the record, his copies are allowed to be authentic till the contrary be proved³ (1).

When the fine has gone through these stages, it is a perfect and complete fine at common law: but in order to render the fine more universally public, and less liable to be levied by fraud or covin, other solemnities have been added by various statutes. Thus, by 27 Ed. 1, c. 1, the note of the fine shall be openly read in the court of Common Pleas, two several days in one week. By 5 Hen. 4, c. 14, and 23 Eliz. c. 3, all the proceedings on fines, whether previous or subsequent to the time of acknowledgment, shall be enrolled of record in the same court. By 1 Ric. 3, c. 9,

¹ Shep. Prac. Couns. 4.² Bull. Ni. Pr. 229.

(1) And if any difference be perceived in the transcripts or indentures of the fine, as recorded in the office of the chirographer and of the *custos brevium*, that record which is in the possession of the chirographer is the *recordum principale*, and considered the true and real record. 3 Leon. 183; Godb. 103. And when the foot or chirographum of the fine is recorded, no averment can be made as to the caption or time of its acknowledgment, but it is deemed to be a fine of that term in which it is recorded; the evidence of a record being of so high and certain a nature, that its authenticity is not permitted to be questioned. 2 Inst. 260, a; Dy. 89, b; *Lloyd v. Say and Seal*, 10 Mod. 40; Salk. 341; 4 Bro. P. C. 379.

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and 4 Hen. 7, c. 24, the fine after engrossment shall be openly read and proclaimed in court sixteen times, viz. four times in the term in which it is made, and four times in each of the three succeeding terms; but by 31 Eliz. c. 2, this is now reduced to four times in the whole, viz. once in the term in which the fine is engrossed, and once in each of the three next subsequent terms; and these proclamations being indorsed on the foot of the fine by the proper officer, are considered as matters of record⁷ (1). And it is in the election of every conusee of a fine or his heirs, to have it proclaimed or not⁸; but though the proclamations should not be made, or be made erroneously, it will not vitiate the fine, as it will still enure as a fine at the common law⁹, for the fine is a perfect matter of record and binding on the parties before the proclamations are made, the proclamations being wholly distinct and different records from the fine itself, and serve only to give an additional operation to the fine in barring estates-tail by virtue of the 4 Hen. 7^b, as will be observed in a subsequent page.

⁷ 1 Cru. 54.

⁸ Dyer, 216, a; 1 Bul.

⁹ 3 Cru. 86, b; Cro. Eliz. 206; and see 3 Leon. 106.

692; Shep. P. C. 5, b.

^b Shep. P. C. 5.

(1) But see Bul. N. P. 229; Gilb. Evid. 25, where it is said that the proclamations must be examined by the roll before they can be admitted as evidence, the chirographer not being appointed by the statute to copy the proclamations, as he is to copy the concord. If any mistake or omission be made in the indorsement, &c. of these proclamations, the court will, upon application, permit them to be amended. *Dowling's case*, 5 Co. 44; *Down's case*, Ibid.; *Pettus v. Godsalve*, 13 Ib. 54; *Strilley's case*, Hutt. 122.

IV. WHAT PERSONS ARE CAPABLE OF LEVYING FINES,
AND TO WHOM A FINE MAY BE LEVIED.

1. *What Persons may levy a Fine.*

A FINE being now received as a species of conveyance of real property, it follows, that all persons capable of granting by deed may grant by fine^c. Who may levy a fine.

And even those who are not capable of executing any conveyance *in pais*, may, under certain circumstances, levy fines, and do other acts of record which will bind themselves and their representatives.

Thus, though we have seen that persons under any mental or civil incapacity, as idiots, persons of non-sane memory, infants, and femmes covert, are disabled from entering into any real contract during the continuance of those impediments; yet, as to judicial acts, and acts done by them in a court of record, they regularly will be binding upon those persons as well as others: if, therefore, an infant levy a fine, it will be good; for though the Judges ought not to admit the acknowledgment of one under that disability, yet having once recorded his agreement as the judgment of the court, it shall, unless it be a fine *sur grant et render*, in tail or for life (1), for ever bind him and his representatives, unless he reverse it by writ of error, which must be brought by him during his minority, that the court, by inspection, may determine his age^d. So if an infant levies a fine, he is enabled to declare the uses of it; for though that be a matter *in pais*, and all

^c See Shep. Prac. Couns. 15; 2 Inst. 483; 2 Buls. c. 2, s. 8; 1 Cru. 106. 320; 12 Co. 122; Yelv. 155;

^d 3 Keb. 480; Co. Lit. 3 Mod. 229; and see 1 Cru. 380; Moor, 76; 2 Rol. Abr. 120.

(1) It is said, that if an infant levy a fine, and take back by the fine an estate in tail or for life, it will be unavoidable by law. *Moor's case*, 202. And see *post*, 430.

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such acts an infant may avoid at any time after his full age, if he do not consent; yet being made in pursuance of the fine levied, which fine must stand good for ever, unless reversed in the manner which has been mentioned, so will the declaration of uses^c. Also, if there be a tenant for life, the remainder to an infant in fee, and they join in a fine, the infant may bring a writ of error, and reverse the fine as to himself, but it shall stand good as to the tenant for life; for the disability of the infant shall not render the contract of the tenant for life, who was of full age, ineffectual^f (1).

But if an infant bring a writ of error to reverse a fine for his non-age, and his non-age, after inspection, is recorded by the court, and before the fine is reversed he levies another fine to another, this second fine shall hinder him from reversing the first; because the second having entirely barred him of any right to the land, must also deprive him of all remedies which would restore him to the land^e.

Also, if an infant levy a fine, and the conusee render to him either for life or in tail, it is said that he shall have no

* 2 Co. 58, a; 10 Co. ^f Leon. 115, 317; 2 Sid. 42, b; Moor, 22; Dalis. 47; 55; 2 Jones, 182; 3 Burr. 2 Leon. 159; Gouls. 13; 1802; *English's case*, cited Jones, 390; Winch. 103, *Bredon's case*, 1 Co. 76. 104. ^e 1 Rol. Abr. 788.

(1) But see Shep. Prac. Couns. c. 2, s. 5, where it is said, on authority of Léon. 115, 317, that if husband and wife (the wife within age) levy a fine of her land, they may, by writ of error, reverse it, and it shall be reversed as to both; and if there be husband and wife tenants for life, remainder to an infant in tail, and all join in a fine, which the infant avoids, it shall be void as to all of them; but it is there admitted to have been adjudged in *English's case*, cited in *Bredon's case*, 1 Co. 76, b, that such fine will be good as to the tenant for life, though it be reversed as to the infant, for each gives what he may lawfully part with.

writ of error to avoid this fine; because the reversal of the fine being only to restore him to the land he parted with by the fine, it would be fruitless to give him a writ of error, since he could not thereby be restored to the land, which the very fine he would endeavour to reverse had before given him^b.

And if the person of the infant be once inspected on his writ of error, and his non-age recorded, although he attain to full age, or die before the fine is reversed, yet he or his heir may reverse it at any time, because the court, having recorded the non-age of the consor, ought to vacate his contract when he appeared to be under a manifest disability at the time he entered into it^c. So where an infant acknowledged a fine, and the conusees omitted to have the fine engrossed till he came of age, in order to prevent him bringing a writ of error, yet the court, upon view of the consance produced by the infant, and upon his prayer to be inspected, and his age examined, recorded his non-age, to give him the benefit of his writ of error, which he must otherwise lose, his non-age determining before the next term^d.

Lastly, by 7 Anne, c. 19, infant trustees being enabled to convey lands and hereditaments under the direction of the Court of Chancery or Exchequer, those courts will direct an infant to levy a fine for that purpose, where that assurance is requisite to perfect the conveyance^e. And as the same power is given by the 4 Geo. 3, c. 16, to the several courts of Lancaster, Chester, Durham and Wales, similar directions, it is presumed, might be given by the

^b Moor, 74; but *quære*.

^c *Ex parte Mair*, 3 Atk.

^d Co. Lit. 380, b; Moor, 479; Com. Rep. 615; and see 3 P. Wms. 387; and 848.

^e *Griffith's case*, Moor, 74; 12 Mod. 444; and see the cases cited 1 Cru. 125; also Shep. P. C. c. 2, s. 5. 217.

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Idiots, &c.

Judges in those courts, in respect of lands situated within their respective jurisdictions.

As to idiots and lunatics, it is necessary to distinguish between their acts done *in pais* and those solemnly acknowledged on record; though the law is clear, that in neither case are they admitted to disable themselves, for the insecurity that may arise in contracts from counterfeit madness and folly; but their heirs and executors may avoid such acts *in pais*, by pleading the disability; because if they can prove it, it must be presumed real, since nobody can be thought to counterfeit it, when he can expect no benefit from it himself^m.

But neither the lunatic himself, nor his heir, can vacate any act of his done in a court of record; and therefore if a person *non compos* acknowledges a fine, it shall stand against him and his heirs; for though the Judges ought not to admit of a fine from a man under such disability (1), yet when it is once received, it shall never be reversed, because the record and judgment of the court, being the highest evidence in the law, the consor is presumed to be, at that time, capable of contracting; and therefore the credit of it is not to be contested, nor the record avoided by any averment against the truth of itⁿ.

So it is in the case of a fine levied by an idiot; it shall stand against him and his heirs; for no averment of idiocy can vacate the fine, nor will an office finding him an idiot *à nativitate* be sufficient to reverse the fine, for that were to lessen the credit of judgments in courts

^m 4 Co. 124; *Beverley's* ⁿ 4 Co. 124; 2 Inst. 483; case, Co. Lit. 247; Bro. tit. Bro. tit. Fines, 75; Co. Lit. Fait. 62; Cro. Eliz. 398, 247. 622; F. N. B. 202.

(1) The statute *de modo levandi fines* expressly provides, that idiots, lunatics and persons of non-sane memory, shall not be permitted to acknowledge a fine.

of record, by trying them by other rules than themselves^o (1).

And as fines levied by persons of this description will be good and unavoidable, so it should seem will be any deeds executed by them to lead or declare the uses of such fines, the fine being the principal, and the deed only accessory^p.

And as fines ought not to be taken from lunatics and idiots, so neither ought they from old doting men who have lost the use of their reason; but yet if taken, they will be good, for the reasons before given; and if they be weak or infirm through age or sickness, that will be no sufficient cause to refuse them^q.

As to *femes covert*, the law looks upon the husband and wife; from the intermarriage, as but one person, and allows of but one will between them, which is placed in the husband as the fittest and ablest to provide for and govern the family, and therefore gives him an absolute power over her chattels personal, to dispose of as he pleases, without her consent; but as to her real estate, it has thought fit that no act of his shall prejudice her or her heirs in it, unless she join with him by some matter of record, and on examination testify her assent to such disposition^r.

^o 2 And. 193; *Hugh Lewis's* case, 4 Co. 124, a. 126, b; 12 Ibid. 124; Co. Lit. 247. ^q West. Fines, s. 4. ^r 10 Co. 42, b. 43, a; 2 Inst. 510; Sid. 11; 1 Rol. Abr. 347. ^p 2 Co. 58; Hob. 224; *Lewing's* case, 10 Co. 42; Winch. 106.

(1) But a fine and recovery levied by a lunatic to a purchaser at a great undervalue, is said in 2 Vern. 678, to have been set aside in Chancery; and in one case, a court of equity is reported to have relieved a remainder-man against a fine levied by an idiot, and that against a *bonâ fide* purchaser. See Toth. Trans. 42; see also *Day v. Hungat*, 1 Rol. Rep. 115; and 1 Fonb. Eq. 48.

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At common law, any alienation made by the husband of the wife's land, whether by feoffment, fine or recovery, was a discontinuance; and after his death she was put to her *cui in vita*, to reinstate herself¹; but now by the statute of 33 Hen. 8, c. 28, it is provided, "That no fine levied by the husband alone, of lands, being the freehold and inheritance of the wife, shall in anywise be or make a discontinuance, or be otherwise prejudicial to her or her heirs; but that the wife and her heirs shall and may lawfully enter into the said lands according to their rights and titles therein." If, therefore, lands be given to husband and wife, and the heirs of their bodies, and the husband alone levies a fine thereof, the wife may enter after his death by force of this statute². But if she neglects to enter within five years after the death of her husband, and the fine be with proclamation, her entry is taken away, and her right for ever extinguished³.

A feme covert ought not, however, to be admitted to levy a fine in any case without her husband; but yet if she do levy a fine of her own inheritance, without her husband, this shall bind her and her heirs, unless she be an infant at the time the fine was levied, and her husband die during her minority, because they are estopped to claim any thing in the land, and cannot be admitted to say she was covert against the record; but the husband may enter and defeat it, either during the coverture, to restore him to the freehold he held *jure uxoris*, or after her death to restore himself to his tenancy by the curtesy; because no act of a feme covert can transfer that interest which the intermarriage had vested in the husband: and if the husband avoids it during the coverture, the wife or her heirs shall never after

¹ 2 Inst. 681.

² 9 Co. 138; 2 Inst. 681;
Cro. Car. 477.

³ For this, see Co. Lit.

326; Dyer, 72, 162; Plowd.

373; 8 Co. 72; 2 Inst. 681;
9 Co. 140.

be bound by it^{*}; and if a feme covert levies a fine executory, as sole, and execution is sued against the husband and wife, he may stop the execution, because no act of her's can prejudice him; and if she be an infant at the time of acknowledging the fine, and her husband die during her minority and it be not a fine, *sur grant et render*, she may avoid it during her minority; but if the coverture continue till her full age, she cannot avoid it without her husband joined with her in it[†]; and if the husband makes default, and she is received, she may, for the benefit of her husband, disturb the execution of her own fine, but after the death of her husband she cannot avoid it^{*}. And an entry by the husband into any part of the land, of which the wife alone levied a fine, will avoid a whole fine^{*}. There is, however, one instance of a married woman being allowed to levy a fine without her husband. The husband had sold lands, and covenanted that he and his wife, (when of age), should levy a fine. When the wife came of age, she refused to join in it; but it was levied by the husband alone, who afterwards went abroad. The wife afterwards consented to levy it, but the husband was absent. It was said, upon motion to levy it, that it had been usual in such cases for the cursitor to make out a *precipe* to the wife as a feme sole; but no example of it was produced. The court would make no rule to authenticate such a fine; but it was afterwards acknowledged *de bene esse* before the Lord Chief Justice then in court[†].

But if a husband and wife join in a fine to convey her own inheritance, or to bar her fortune or dower out of her husband's lands, it ought to be received, if upon her

^{*} Shep. Prac. Couns. 9; Bro. tit. Fines, 33; 7 Co. 8; Hob. 325; 10 Co. 43; Co. Lit. 46.

[†] Shep. Prac. Couns. 9.

^{*} Bro. tit. *Fine*, 79; Co. Reading, 9.

^{*} *Mayo v. Combes*, 1 Freem. 396.

[†] *Moreau's case*, 2 Bl. Rep. 1205.

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examination it appears to be voluntary and free from constraint; and if she be of full age, the fine shall bind her as if she had been sole^a.

The examination of a feme covert is not, however, always necessary in levying fines, because that being provided that she may not at the instance of her husband make any unwary disposition of her property, it follows, that when the husband and wife take an estate by the fine, and part with nothing, the feme need not be examined: but where she is to convey or pass any estate or interest, either by herself or jointly with her husband, there she ought to be examined; therefore, if *A.* levies a fine *come ceo* to baron and feme, and they render to the conusor, the feme shall be examined; so it is where she takes an estate by the fine, rendering rent^d.

A feme covert, being a trustee of lands, may also levy a fine of them, although an infant, if directed so to do by the Court of Chancery or Exchequer, in pursuance of the statute 7 Anne, c. 19, or by other inferior courts, by virtue of 4 Geo. 3, c. 16.

Queen.

But the queen may levy a fine notwithstanding her coverture, she having in all cases the privilege of suing and being sued alone, and is considered in all legal proceedings as a feme sole^e.

The estate of
conusor.

But it is to be observed, that none of the persons before enumerated, can levy a fine of lands to affect strangers, unless they have at least an estate of freehold in them either by right or by wrong; for otherwise it might be in the power of any two strangers to deprive a third person of his estate, by levying a fine of it, so that in every case where a fine is levied, and none of the parties to such fine have any estate of freehold in the lands of which the fine is

^a 18 Edw. 4, 12; 1 Rol. Co. Lit. 353; Lit. s. 670; Abr. 347; 2 Rol. Abr. 20; 2 Rol. Abr. 17.

² Inst. 515; 3 Atk. 712; • Co. Lit. 3, a. 133, a; Shep. Prac. Couns. 9. 4 Co. 23, b.

^d Shep. Prac. Couns. 10;

levied, it will only bind the parties themselves, and their heirs, but may at any time be set aside by the real owner, by pleading that neither of the parties had an estate of freehold in the lands at the time^f.

Hence, therefore, if a person who is only possessed of lands for a term of years, or who holds them by a statute merchant, statute staple, or writ of *elegit*, or is tenant at will, levies a fine, it will have no effect whatever as to strangers, because the conusor has no estate of freehold; but it may be good and binding upon themselves by estoppel^g.

Upon the same principle, a fine levied before entry or receipt of rent will be void^h. So of a fine levied by a copyholder of his copyhold; because the freehold is in the lord (1).

But a tenant for life, he having an estate of freehold in him, may levy a fine, and it will be good to pass his estate for life (2).

^f Shep. Touch. 14; West. Symb. 2; Shep. Prac. Couns. 10, 11; Jenk. Cent. 6, Ca. 45. ^g Ibid.; 3 Co. 77, b; Shep. P. C. 11. ^h Lord Townsend v. Ash, 3 Atk. 336; Co. Copy. s. 55.

(1) The only mode, therefore, by which a lessee for years or a copyholder can levy a fine, so as to give it any effect, is by first making a feoffment, by which means he acquires a freehold by disseisin. Co. Lit. 337, a. n.; Plow. 353; Shep. P. C. 11.

(2) But he must be careful he do not thereby commit a forfeiture; for if tenant for life levy a fine *sur conusance de droit come ceo*, &c. or a fine *sur done, grant and release* to a stranger, to hold for a longer term than the life of the tenant for life, it will be such a forfeiture of his estate as the reversioner or remainder-man may take a present advantage of; but if he levy a fine *sur grant and release*, to hold to the conusee for the life only of tenant for life, or grant his estate by such fine to the person in reversion or remainder, or grant a rent only out of the land, though

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So a person having a defeasible right only to lands, may, notwithstanding, levy a fine of them, which cannot be set aside by the plea that neither of the parties had an estate of freehold in the lands¹.

Cestui que trust.

So a *cestui que trust* may levy a fine of his trust estate, although he is only tenant at will to his trustees; for it is now settled in equity, that any legal conveyance or assurance by the *cestui que trust* shall have the same effect on the trust estate, as it would have had on the legal estate, if the trustees had conveyed it to the *cestui que trust*. And if it were not so, trustees, by refusing, or by not being capable of executing their trust, might prevent a *cestui que trust* tenant in tail from exercising the power given him by the law over his estate, which would tend to the introduction of perpetuities.

So, a fine levied by a vouchee to the demandant, or a fine from the demandant to the vouchee, will be good; because in law the vouchee is supposed to be tenant of the land².

An alien, not being capable of holding lands, ought not to be permitted to levy a fine; and if he do, it will not conclude the king after office found¹.

Corporations aggregate cannot levy fines; because, as they are invisible, they can only appear by attorney; whereas the statute *de modo levandi fines* requires that the parties to a fine shall appear personally before the judges². But a sole corporation, it is said, may acknowledge a

¹ *Carter v. Barnardiston*,
1 P. Wms. 505.

j 1 Cha. Ca. 213; Cas.
temp. Talb. 43.

² 3 Co. 29, b; Shep. Prac.
Couns. c. 2, s. 7.

¹ 13 Vin. Abr. 228.

² Co. Read. 7; but see
Shep. Prac. Couns. c. 2, s. 6.

for a longer term than his life, it will be no forfeiture; and it is the same of tenant in tail, after possibility of issue extinct, tenant by the curtesy, and the like. Shep. Prac. Couns. 11.

fine^a. And so, according to some, corporations aggregate, as a mayor or commonalty, and the like, being a secular corporation, may together levy a fine of lands belonging to the corporation, as a single person may^c. But a spiritual corporation, whether sole or aggregate, as bishops, dean and chapter, heads and fellows of colleges, or the like, cannot levy fines of the corporate lands; for the disabling statutes, which prevent ecclesiastics from alienating their church lands for any longer time than three lives or twenty-one years, by necessary implication prohibit them from levying fines.

And by the statutes 11 Hen. 7, c. 20, and 32 Hen. 8, c. 28, women seised of jointures or estates-tail of the gift of their husbands, and husbands seised *jure uxoris*, are prohibited from levying fines of such estates.

Persons outlawed in personal actions may levy fines, for their estates still remain in them, although they have forfeited the rents and profits^b. And a person who has committed murder, may, it seems, before conviction, levy a fine, if the deed to lead the uses be prior to the time of committing the offence^d.

The king, it seems, cannot levy a fine, because no writ of covenant can be brought against him; but if a fine be levied to the king, he may then make a grant and render, which will bind him^e.

Joint-tenants, tenants in common, and coparceners, may levy fines of their respective parts, but it will be a severance of the tenancy^f (1).

^a Co. Read. 7.

^c *Stevens v. Winning*, 2

^b Shep. Prac. Couns. c. 2, Wils. 219.

^d 6. 7 Co. 32.

^e West. Sym. 2; Shep. P. 1 Co. 58, a; 6 Mod. 45,
C. 12. 1 Salk. 286.

(1) And if joint-tenant levy a fine of the whole, it will not amount to an ouster of his companion, unless he omit to make his claim within five years.

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2. *To whom a fine may be levied.*

To whom a fine
may be levied.

With respect to the persons to whom a fine may be levied, it is to be observed, that all persons who are capable of taking by grant or deed *in pais*, may be good conusees and take by fine; a fine may therefore be levied to "any man or woman, sole or covert, of full age or under age, any mad or lunatic person, idiot, or man *de non sane* memory, any man in or out of prison, or beyond sea, any person attainted of felony or treason, or outlawed in a penal action, a bastard, a clerk, convict, an alien, and all others, except such as are civilly dead, as monks and the like; and it will be good."

And where a fine is levied to a feme covert or an infant, they need not be examined as they are when they are consors of the fine, because the law presumes everyone's assent to a grant that is for his benefit¹. So corporations, whether civil or spiritual, may, with the consent of the justices of the court of Common Pleas, be conusees, and beneficially take by fine²; but in levying fines to corporations or fraternities, care must be taken to describe them by their real and true name or appellation, as named in the charter and foundation of it; for as it has no existence but by force of such charter, if it be called by any other name than is there given it, it is not the same corporation³.

But a fine *sur consance de droit come ceo*, &c. cannot, generally speaking, be levied to any person who is not a party to the writ of covenant, because no other than parties to the writ are before the court⁴; but yet it is said, that a fine may be levied to the demandant by the vouchee, or to the vouchee by the demandant, though they are no parties to the writ, because the vouchee is, in supposition of law, the tenant of the land⁵. So therefore

¹ Shep. Prac. Couns. c. 2,

² Ibid.

s. 7; Shep. Touch. 7.

³ Ibid.; 2 Inst. 513.

⁴ Ibid.

⁵ 3 Co. 29; Shep. P. C.

⁶ Shep. P. C. c. 2, s. 7.

13.

a fine may be levied by the tenant to the demandant, or by the demandant to him^a.

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V. OF WHAT THINGS A FINE MAY BE LEVIED, AND
BY WHAT DESCRIPTION.

It may be taken as a general rule, that a fine may be levied of all things of which a *præcipe quod reddat* lies, and of all things which are inheritable and *in esse* at the time of the fine levied, whether the thing be ecclesiastical and made temporal, or temporal^a; or whereof a *præcipe quod faciat*, doth lie, as the writ of customs and services; or a *præcipe quod permittat*, as of an office, to have a common way, &c.; or a *præcipe quod teneat*, as a writ of covenant to levy a fine, and the like^b. So of an honor, manor, island, barony, castle, messuage, cottage, mill, toft, curtilage, dove-house, garden, orchard, land, meadow, pasture, wood, underwood, chapel, river, chauntry, corody, office, fishing, warren, fair, rectory, mines, a view of frankpledge, waif, estray, felons, goods, deodands, hospital, furze, heath, moor, rent, common, advowson, parsonage, vicarage, hundred, way, ferry, franchise, seignior, reversion, toll, tallage, pickage, pontage, aquitail, services, portion of tithes, oblations, ecclesiastical or spiritual property in lay hands, or the like^c. To which may be added, shares in the New River water, of which fines are levied by the description of so much land covered with water; but when a fine or recovery of these shares are necessary, there must be three several fines and recoveries^d, this river running through the several counties of Hertford, Middlesex and London.

^a Dyer, 179; Plow. 146;

² Inst. 514.

^a Ibid.; Shep. Prac. Couns. 13, by 32 Hen. 8, c. 7; West. Symb. in his Tract of Fines; Co. Read. 11.

^b 2 Inst. 513.

^c 8 Co. 145; 1 Wils. 242;

Shep. Prac. Couns. c. 2, s. 9; Shep. Touch. 11.

^d 2 P. Wms. 128.

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Where money is agreed to be laid out in lands to be settled in tail, a fine cannot be levied of the money, but a decree of a court of equity will bind it as much as a fine alone would have bound the land if it had been bought and settled^a; but where the estate-tail is of such a nature as would require a recovery, and the remainder-man has but a chance for the estate, as the tenant in tail may happen to die before the recovery suffered, or in a vacation when a recovery cannot be suffered, a court of equity, whose business it is to aid the intent of parties, will not, in violation of such intent, decree the payment of the money to the tenant in tail, but decree it to be laid out in a purchase of land, to be settled according to the direction of the party, in order that the chance of the remainder-man may be preserved^f.

But in order to render these things capable of passing by the fine, care must be taken that they are named in the writ of covenant, for that being the foundation of the fine, nothing can pass by it unless by way of render, which is not there named, for that alone is the subject of the suit and compromise; but a pecuniary rent or other *redditus* may be granted, or rather created and secured by fine, though not named in the writ, because that may be the consideration of the compromise by the parties^g. So of reversions and remainders^h.

A fine may be of a rent-charge *de novo*, or which had no being before, or of a chief rent or other rent not *in esse*, but not of annuity, though payable to a man and his heirs, because this is only a personal inheritanceⁱ. But a fine cannot be levied of lands held in ancient demesne^k.

^a 1 P. Wms. 130; 2 Atk. 453; 3 Ibid. 447; 1 Ves. 146.

^f 1 P. Wms. 471, 485; *Pultney v. The Earl of Darlington*, 1 Bro. Chan. Rep. 223; and see 39 & 40 Geo. 3, c. 56, and *ante* vol. 1. p. 26.

^g 7 Co. 38.

^h Shep. Prac. Couns. 12.

ⁱ 1 Stra. 106; 21 Edw. 3, 44; 18 Edw. 4, 22; West. Symb. part 2, s. 25.

^k 8 Co. 145.

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By what denomination.

With respect to the description by which things should be named in a writ of covenant and concord of a fine, it is to be observed, that in strictness, the same precision is requisite as in the writ of *precipe quod reddat*, in an adversary suit, as the shire, town, parish or hamlet where the lands lie, for the place where it lies is considered to be part of its name¹; but it being universally known and taken as an amicable composition upon a feigned suit, instituted for the sole purpose of effecting a conveyance of land from one person to another, it is construed with the same liberality as other conveyances, and therefore an honor will pass by the name of a manor, as well as by its own proper name; and that though the town or place, or towns or places in which it lies, be not mentioned²; and although it was formerly held to be necessary in levying a fine of a manor to describe it by its demesne services, &c. yet since fines are now considered to be common assurances, they will pass by the name of a manor with its appurtenances³. So other things may pass in fines by the same names they are granted in deeds, as a castle or hundred, being parcel of a manor, may pass by the name of the manor of which it is parcel; and one manor, being parcel of another manor, may pass by the name of that manor of which it is parcel⁴. And so, though it be not a real manor at all, but only a reputed manor, it will pass by the name of a manor, as will lands reputed to be parcel of a manor pass by a fine levied of such manor with its appurtenances⁵.

So by the name of a messuage, a house, a curtilage, a garden, an orchard, a dove-house, a shop, or mill, as parcel of the same, will pass⁶. As will a cottage, a toft, a cham-

¹ Bro. Fines, 91; Shep. 16; 1 Edw. 3, 4; 27 Hen. 6, 2.
Prac. Couns. 15.

² 19 Edw. 4, 9.

³ 3 Inst. 513; Shep. Prac. Couns. 15.

⁴ 26 Ass. p. 64; 2 Edw. 3,

⁵ Cro. Eliz. 524, 707;

6 Co. 63.

⁶ Plow. 169, 171; West. Sym. 2; Shep. Prac. Couns.

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ber, a cellar, or the like. A chapel or an hospital may also be demanded in a fine, and pass by the name of a messuage^r. But it has been holden, that none of these things will pass by the general description of a tenement, for a tenement may be a messuage, land or any thing else that lies in tenure, and therefore defines no one thing in particular^r. And a reversion of land may pass either by the name of a reversion, or by the name of the land itself, or by the word remainder, or right or interest^r.

Land, meadow, or pasture, wood and the like, may pass either by the description of the number of acres (1) contained in it, or by the measure of the superficial quantity, as a hyde of land, an oxgang, rood, furlong^s, &c. And house-boot, hay-boot, and plough-boot may pass by the name of estovers^w.

Parsonages, rectories, advowsons, vicarages or tithes impropriate will not pass by the names of the advowson of such a church, but of the rectory of such a church with the appurtenances; the word rectory comprehending the parish church, with all its glebes, rights, tithes and other profits^s. But when the fine is but of a presentation to a church, it must be of the advowson of such a church without the words with the appurtenances; and so of all vicarages, endowed or not endowed^r.

If a fine be levied of a part of an entire thing, it must be described as a moiety, a third, or a fourth part, as

^r 13 Ass. pl. 2.

^s *Courtney's case*, 1 Leon.

188.

^t Shep. Prac. Couns. 16.

^w 16 Ass. 9; Shep. Prac.

Couns. 16.

^w West. Symb. *ubi supra*.

^s Spelm. Gloss. *Rectoria*.

^r Shep. Prac. Couns. c. 2,

s. 9; Shep. Touch. 12.

(1) And note, that where a fine is levied of so many acres of land, the acres are to be considered as customary acres, and not acres according to the statute. *Waddy v. Newton*, 8 Mod. 276; *Brugh's case*, 6 Co. 67, a.

the case is. But if an entire thing, as a manor or messuage, be parted, as if the manor of *S.* be divided into two parts, (if the division be so made that the manor of that part be not extinct) and a fine be levied of a part of it, it must pass by the name of the whole manor. So if a messuage and twenty acres be equally parted, the part divided shall pass by the name of one messuage and ten acres of land, and not by the name of a moiety of a messuage and of twenty acres of land^a.

The county, town, parish and hamlet in which the lands, &c. lie, of which the fine is levied, ought likewise to be set forth^a; but if the description be, upon the whole, such as sufficiently to identify the land meant to be conveyed, it will pass, though the particular place where it is situated be omitted, or a wrong place be named^b.

But to avoid all doubt with respect to the particular lands or other things intended to pass by fines, (which often comprehend them under very general and indefinite terms and descriptions, as 100 acres of land, &c. without mentioning the names or abutments by which they are generally known), it is usual and extremely proper to insert a particular description of them in the deed declaring the uses of the fine, which is considered as the best guide in ascertaining the real land intended to be comprised in the fine^c. And if any error be made in the description of the lands intended to be comprised in the fine, the court will frequently permit it to be amended upon the production of the deed declaring the uses of the fine, or other

^a Shep. Touch. 13; Moor, 250; 3 Rep. 88; Shep. Prac. Couns. 17.

^a *Stork v. Fox*, Cro. Jac.

120.

^b *Monk v. Butler*, Cro. Jac. 574; *Faveley v. Easton*,

Cro. Car. 269, 276; and see *Waldron v. Roscarriot*, 1 Mod. 78; 1 Vent. 170.

^c See Jenk. 254; *Eyton v. Eyton*, 1 Brow. Par. Ca. 156; 2 Atk. 241.

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sufficient evidence of the mistake^d; but where the alteration proposed be material, as in altering the number of acres from a less to a greater number, or the like, the court will require clear proof that the intention of the parties was agreeable to the alterations proposed^e.

VI. IN WHAT COURT AND BEFORE WHOM A FINE MAY BE TAKEN.

1. In what court a fine may be levied.

A FINE being the compromise of a suit instituted for the recovery of real property, it might formerly be levied in any court which had jurisdiction to hold pleas of such property^f.

But by the statute *de modo levandi fines*^g, it is enacted, that fines shall thenceforth be levied in the court of Common Pleas, or before Justices in eyre, and not elsewhere, (two Justices at least being then present)^h. Except the lands be situated within the jurisdiction of the courts of the county palatine of Lancasterⁱ, or of Chester^k, or of the court of the city of Chester^l, the court of the county palatine of Durham^m, the courts of great sessions in Walesⁿ; courts of ancient demesne of land holden by that tenure^o; or (by special custom) in courts of cities and corporate towns where such courts have authority to

^d 1 Ld. Raym. 209; *Tregore v. Gennys*, Pig. Recor. 218; Cru. 151; *Walker v. Oxenden*, Ibid.; *Forster v. Pollington*, Barnes, 216; *Craghall v. Pattison*, Ibid. 24; *Bohoun v. Burton*, 3 Wils. 58.

^e *Powell v. Peach*, 2 Black. Rep. 1202.

^f See the authorities cited 1 Cru. Fines, 77.

^g 18 Edw. 1.

^h See 2 Inst. 515; Co. Read. 8.

ⁱ 37 Hen. 8; 1 Wils. 275.

^k 2 & 3 Edw. 6, c. 28.

^l 43 Eliz. c. 15, s. 3.

^m 5 Eliz. c. 27.

ⁿ 34 & 35 Hen. 8, c. 26, s. 40.

^o Blac. Tracts, 218, 231; 2 Inst. 513; *Hunt v. Bourne*, Salk. 339; Com. Rep. 93, 124; *Dyer*, 111, b; 1 Bro. P. C. 48.

hold pleas of land²; or within the royal franchise of Ely³.

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2. *Before what persons fines may be levied.*

By the statute *de modo levandi fines* it is provided, that the acknowledgment of fines shall be taken in the presence of all the Justices of the court of Common Pleas; but that statute being impliedly repealed by the statute 4 Hen. 7, the presence of two of such justices was afterwards deemed sufficient to give validity to the fine⁴. And we have already seen, that it may also be levied before the Justice or Justices of the provincial courts of Lancaster, Chester, Durham and Ely, as likewise before those of the court of great sessions of Wales, and of the courts of ancient demesne. But in every case a personal appearance in court was required by the statute; the inconvenience, however, which this occasioned to old or infirm persons residing in distant parts of the kingdom, gave rise to what is called the statute of Carlisle (but which, in fact, is no more than a writ directed, by Edw. 2, to the Judges⁵), by which it is provided, "that if any person be decrepit by age or impotence, or by casualty so oppressed or withholden," as to be unable to attend personally in court, two or more of the Justices with the assent of the residue of the Bench, or one Justice attended by a knight, being a man of good fame and credit, may receive the consance of the party at his place of residence certifying such acknowledgment under their hands and seals to the court of Common Pleas at Westminster, on the sanction of this writ. On a feigned suggestion of infirmity, fines may now, therefore, be levied, (and where the expense or inconvenience attending a journey to Westminster would be considerable, or the urgency of the case requires them

Before whom
fines may be
levied.

² Mad. Form. Angl. 379, ⁴ Co. Read. 8; and see 394; see *Warring v. Whale*, Shep. Prac. Couns. 17.
³ Cro. Eliz. 314; 1 Leon. 188. ⁵ 2 Reeves, 304.

⁴ 1 Bac. Abr. 636; 1 Cru. Fines, 85.

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to be acknowledged before the ensuing term), usually are levied before commissioners appointed for that purpose by virtue of a writ of *dedimus potestatem*, or special commission issued out of Chancery to certain persons therein named, answering the description (or said to answer the description) of the persons mentioned in that statute¹.

And by the custom of the realm the Chief Justice of the Common Pleas may take conusance any where out of court, and certify the same without any *dedimus*: and if a serjeant has a patent to be Chief Justice, he may take conusances without a *dedimus* before he is sworn². So by custom, the Judges of Assize may, in their circuits, take the acknowledgment of fines without any writ of *dedimus potestatem*, on account of the great confidence which the law places in their judgment and integrity: in such cases, however, a writ of *dedimus potestatem* ought, in strictness, to be sued out, bearing date before the acknowledgment of the fine; but in practice this is not always attended to, nor required by the courts³. And by 34 & 35 Hen. 8, c. 26, s. 40, the Justices of Wales have the same authority by virtue of their general commission, with respect to lands lying within their jurisdiction (1).

As this *dedimus* recites that a writ of covenant is depending between the parties, it must bear date subsequent or at least not prior to the writ, or the fine may be set aside for error⁴. In a case, however, where the *dedimus* was tested on the same day with the writ of covenant, the

¹ See Wils. 78; Co. Read. 9; 2 Vent. 30; Cru. 90.

² Dyer, 224, b; Co. Read. 9, 10; 2 Inst. 512; Cro. Eliz. 469.

³ Jenk. 227; Dyer, 224, b; *Argenton v. Westover*, Cro.

Eliz. 275.

⁴ *Goburn v. Wright*, Cro. Eliz. 740.

(1) This is, however, in no case to be understood where such chief or other justices, or commissioners, are themselves parties or privies to the fine, as they would then be *judices in propriis causis*. 8 Hen. 6, 21; Dyer, 220, b.

court held it to be well enough, for that the writ of covenant may be said to be depending immediately upon the purchase of it, and that if a stranger were afterwards to purchase the lands it would be *champerty*^a.

If the *dedimus* be directed to two jointly, and the conusance be taken by one only, the fine is erroneous; for where two are invested with a joint power, it cannot by any construction from the commission be executed by one only^a.

If a *dedimus* be awarded to take the conusance of three several persons, the commissioners may take the conusance from each of them and at several times, for it may so happen that they cannot meet at one place at the same time; and if the commissioners return the conusance of but two of them, the court may erase the name of the third out of the *dedimus*, and make the writ of covenant agreeable to it; for since the third does not join, it can be no prejudice to him; and therefore it were unreasonable that his obstinacy or refusal should impeach the conusance of the other duly taken, and so prevent their amicable composition of their differences^b.

A *dedimus* was awarded to take the conusance of a fine from baron and feme, and the feme refusing to join, the conusance of the husband only was returned; in this case the court ordered a new *dedimus* to be awarded, but to be of the same date with the former, and that the return of the commissioners should be annexed to it; for the refusal of any one of the conusors can be no reason to delay or hinder another to transfer his right^c.

Many fines having been found to be improperly levied since the practice of taking the acknowledgment before commissioners, by a rule of the court of Common Pleas, it was directed, that no fine acknowledged before commis

^a *Arundel v. Arundel*, Cro. Eliz. 677; Cro. Jac. 677; N. B. 327.
5 Co. 47, b.

^b Cro. Eliz. 576, 577; F.

^c Cro. Eliz. 576, 577.

^a *Downes v. Savage*, Cro. Eliz. 240.

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sioners should be allowed to pass unless some person who was present when the fine was acknowledged, should appear personally before the lord chief justice of the court and be examined upon oath touching the execution thereof⁴. But this rule having been found by experience to be attended with inconveniences, and not having answered the good purposes for which it was intended, it was afterwards ordered⁵, that instead of an oath made *viva voce* of the due acknowledgment of the fine, an affidavit in writing on parchment shall be made and annexed to every fine, in which the person making the same shall swear that he knew the parties acknowledging such fine; that the same was duly signed and acknowledged; that the party or parties acknowledging, and also the commissioners taking the same, were of full age and competent understanding; that the *femes covert* (if any) were solely and separately examined apart from their husbands, and freely and voluntarily consented to acknowledge the same; and that the *conusor* or *conusors*, knew the same to be a fine to pass his or their estate or estates: which fine, together with such affidavit annexed, shall be transmitted to the lord chief justice, or some other justice of that court, for his allocation; and such affidavit shall remain annexed to such fine, and be left with the same in the proper office: and that every such affidavit, except where the persons, at the time of their acknowledging the fine, were in Ireland, or some other parts beyond the seas, shall be made by some attorney of the courts of Westminster-hall. And it is ordered, that in the affidavits made in pursuance of the preceding rule, the person or persons so making the same shall swear that the fine was duly signed and acknowledged upon the day and year mentioned in the caption; and if there be any *rasure* or *interlineation* in the body or caption of such fine, that such *rasure* or *interlineation* was made

⁴ Wilson, 82. See *Dean v. Tidmarsh*, Barnes, 143.

⁵ Hill. 17 Geo. 2; Wilson, 85.

before the party or parties signed the said fine, and before the caption was signed by the commissioners^f.

These rules have, however, in some instances been dispensed with, as where the attorney has died before affidavit made^g, or the fine has been acknowledged out of the kingdom^h.

VII. OF THE EFFECT AND OPERATION OF A FINE.

IN considering the effect and operation of a fine, it will be proper to distinguish between the operation of a fine prior to the statute 4 Hen. 7, c. 24, and its operation subsequent to that statute, or rather the difference between a fine levied in the manner prescribed by the common law and one levied in the manner directed by this statuteⁱ.

1. *Of a fine at common law.*

A fine being considered to be a composition of a suit commenced by the conusee against the conusor for the recovery of land, and the concord, coming in lieu of the judgment which would have been pronounced by the court had the suit proceeded, a fine was at the common law allowed to have the same force and effect as such judgment would have had if given in an adversary suit on a writ of right^k, viz. the effect of fully ascertaining and establishing the rights of the respective parties. And the possession being delivered by the sheriff in pursuance of the writ of *habere facias seisinam* directed to him for that purpose, the fine transferred to the conusee not only the right of possession, but also the possession itself⁽¹⁾. And by

Of the effect of
a fine at com-
mon law.

^f Hill. 26 & 27 Geo. 2; v. *Sinclair*, 2 Blac. Rep. 880.

^g *Say v. Smith*, Barnes, 217. ⁱ See Shep. Prac. Couns. 45, *et seq.*; and Prest. Tracts, 26.

^h *Fleetwood v. Calenda*, Ibid. 219; *Heathcock v. Hanbury*, Ibid. 217; *Seton* ^k Plow. 357; and see 1 Cru. 157.

(1) Actual delivery of possession by the sheriff is now rendered unnecessary, by the statute *de finibus levatis* (27 Edw. 1.) which, on account of the great number of suits commenced

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the old common law it was held to vest a complete and indefeasible title in him against all subsequent claimants¹. Afterwards, however, (that is to say, in the time of Edw. 1, though by what authority does not now appear) persons were allowed a year and a day to assert their claims against this judgment²; but if no claim was made within that period, the fine operated as a perpetual bar against all persons whatever who were within the four seas at the time, of full age, out of prison and of good memory; and this, not only on account of the great force ascribed by the common law to the decisions of the king's courts in settling the rights of the contending parties, but because, says Coke³, the law hath ordained the court of Common Pleas as a *market overt* for assurances of land by fine, which shall be good, not only against the seller, but all strangers, like unto the sure and safe way of acquiring the property of *goods* by sale in market overt.

This operation of a fine to bar the rights of strangers must, however, be understood to have extended to such persons only as were under no disability to make their claim at the time when the fine was levied; for persons not of full age, or in prison, of non-sane memory, or beyond the four seas at the time possession was delivered of the land to the conusee, (till when strangers were not presumed to have notice of the alienation of the property*), were excused as well by the common law as the statute *de modo levandi fines* from pursuing their rights within the

¹ See Mad. Diss. 14, 15; 1; and see Doct. and Stud. Brac. 436; 2 Inst. 511; Dial. 1, c. 23.

² Cru. 160.

³ Co. Read. 14; 2 Inst.

^a See Fleta, lib. 6, c. 53.

522; Plow. 359; 1 Co. 97.

^b 3 Co. 78, b; Co. Read.

commenced to set aside fines, on the ground of no transmutation of possession having been made, enacted, that no such averments should thenceforth be admitted. See 1 Recv. 450; Co. Read. 18; 2 Inst. 522.

year and day, or, indeed, within any definite time after^p. A similar indulgence was also by the common law allowed to *femes covert* who were not bound to make any claim during their coverture^q. And afterwards, by the statute 34 Edw. 3, c. 16, called the statute of non-claim^r, *all other persons*, as well as those labouring under such disability, are relieved from the necessity of asserting their rights within any limited period, the statute declaring that the plea of non-claim of fines to be thenceforth levied, shall not be taken nor holden for any bar in time to come (1). A statute, which though it wholly destroys the peculiar excellence and use of fines, by admitting persons to claim, and falsify a fine at any indefinite distance of time^s, is still in force with respect to all fines levied as at common law without proclamations under the statute 4 Hen. 7^t, and these fines not only bar all parties and privies to the concord but when levied by a tenant in tail in possession, though they do not bar his issue in tail, operate as a discontinuance of such estate, and put the persons in remainder or reversion to their writ of formedon (2).

^p Brac. 436, b; Plow. 360;^r Rot. Par. vol. ii. p. 142.^q 2 Inst. 516; 2 Blac. Rep. 994.^s Lit. s. 441.^t Ibid.^u See *post*, next sect.

(1) This statute was passed on account of the hardship which was frequently suffered by remainder-men in fee, being defeated of their estates by persons having intermediate estates for life, neglecting to make their entry; for if there was tenant for life, with remainder to another for life, remainder to another in fee, and a fine was levied of the land by an alienee of the first tenant for life, and the person next in remainder for life neglected to enter within the year and day, not only he, but also the remainder-man in fee, was for ever barred of his right, and no entry could be made by the remainder-man during the subsistence of the intermediate remainder for life. Plow. 357, 359; 1 Inst. 254, 262; 2 Ibid. 51.

(2) By statute 21 James 1, c. 16, this writ must be brought within twenty years after the right of the party accrues, unless the person having the right be under any of the disabilities mentioned in the statute.

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Fines levied
under 4 Hen. 7.

2. We now come to consider the effect and operation of a fine levied in the mode prescribed by the statute 4 Hen. 7, c. 24; viz. a fine levied with the proclamations and formalities noticed in a preceding page when considering the different parts of a fine^u. The quality allowed by the common law to fines, of barring all who should not claim within a year and a day was, we have seen, abolished by the statute 34 Edw. 3, c. 16, which admitted persons to claim and falsify a fine at any indefinite distance^v. But by this innovation in the common law, "great contention arose, and few men were sure of their possessions^x." Hence the statute 1 Rich. 3, c. 7, and 4 Hen. 7, c. 24, were passed, which restored the doctrine of non-claim, though with some variation, proclamations being required by these statutes for the purpose of making the transfer more notorious, and the time of claiming being enlarged from a year and a day to *five* years after such proclamations made, "thus excellently moderating between the rigour of the ancient common law, and the latitude given by the statute of non-claim^y." So that now it may be inferred that a fine with proclamations concludes all persons, as well strangers as privies, except women covert, persons under age, in prison, out of the realm, or of *non sane* memory, not being parties to a fine; "saving, the right and interest that any persons (other than parties) have at the time of the fine engrossed, so that they or their heirs pursue such their right or interest by action, or lawful entry within five years after proclamations made; and saving the right and interest of all persons which accrues after engrossing of the fine, so that the parties having the same, pursue it within the like period of five years after it so accrues." And if at the time of the fine engrossed, or of such accruer, the persons be covert (and no parties to the fine) under age, in prison, out of the realm or of *non*

^u See *ante*, sec. 3.

^v Lit. s. 441.

^x 2 Inst. 528.

^y 2 Blac. Com. 353.

sane memory, they or their heirs have time to pursue their action within five years after such imperfection removed (1).

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But though the statute 4 Hen. 7, evidently concludes all persons under the words "privies and strangers," and the savings extend to strangers only, and not to privies, yet it was at first doubted, whether a fine levied by tenant in tail could bar the issue by the construction of this statute (2); for entails had now continued so long, and been so much favoured by the nobility and people on account of their not being forfeitable for treason, that the judges were cautious at first, in making so large an exposition of the statute as it would bear, particularly when the statute *de donis* had expressly declared that a fine should not be a bar to estates-tail: and though at length the judges resolved that a fine with proclamations was a bar not only to the tenant in tail (because he could claim no right against his own acknowledgment on record that it was the right of another) but also against the issue in tail, because the words and intention of the statute place the privies, that is, the persons claiming the right devolved at any time on the conusor, in the same condition

Bar of Entails.

(1) The force given to a fine by the statute 4 Hen. 7, in barring the rights of strangers as well as parties and privies, has made it become a common practice to levy fines merely for the purpose of guarding a title against dormant claims, by shortening the usual time of limitation: for whilst other assurances admit of an entry upon the estate within twenty years, and a writ of right within sixty years afterwards, this precludes all latent titles, and puts an end to all litigation after the expiration of five years from the completion of the proclamations directed by the statute.

(2) See the reasons of this doubt and the opinions *pro* and *con*, And. 46, 170; Plow. 373; and, in particular, *Murray ex dem. Earl of Derby*, T. Raym. 260, 286, 319, 338; 2 Jon. 238; Pollexf. 491; Skin. 95; 4 Reeve, 334; Co. Lit. 121, a. n. (1) 372; 1 Cru. 172.

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as the conusor himself by the authority of the legislature ; yet to prevent all future doubt upon this subject, the statute of 32 Hen. 8, c. 36, was passed, which by a retrospection confirms the construction made by the judges on the 4 Hen. 7, c. 24, and declares that " all fines levied with proclamations by any person or persons of full age, of lands entailed, before the time of the fine levied, to the person so levying the same, or to any of their ancestors in possession, reversion or remainder, or in use, shall immediately after the fine engrossed, and proclamations made, be a sufficient bar against them and their heirs claiming the said lands only by such intail, and against all others claiming the same only to their use, or to the use of any heir of their bodies." Unless such fine be levied by a woman after the death of her husband, of lands which were by the gift of him or his ancestors assigned to her in tail for her jointure*. Or unless it be of lands entailed by act of parliament or letters patent, and of which the reversion belongs to the crown.

The persons, whose rights are barred by the fine, are, we perceive, parties, privies and strangers; now with respect to the parties themselves there can be no doubt, but with respect to privies, (which is the material and operative word in 4 Hen. 7, c. 24), it is to be observed that this word has various significations, and means either a privity in estate, as between grantor and grantee which arises purely from their own contract, or a privity or relation between parties arising only from blood, as ancestor and heir; but neither of these are intended by the word privies in this act, " for it were unreasonable to allow any man to strip me of my acquisitions or inheritances, without any laches or neglect of mine, because I happen to be his heir, or because by a fair contract I am concerned in interest with him, or am his tenant*."

* See 11 Hen. 7, c. 20.

* Bac. Abr. "Fines," (B.); Co. Lit. 271, a; 8 Co. 42, b.

The privies understood and intended by this act are those who are privy not only in blood to the conusor, but likewise in estate and title to the land of which the fine was levied; that is, those who must necessarily mention the conusor, and convey themselves through him before they can make out their title to the estate.

If, therefore, there be two joint-tenants, and one of them levies a fine, or if there be grantor and grantee, and one of them levies a fine, though there be a privity between each of these within the letter of the act, yet neither the joint-tenant in the one case, nor the donor in the other, shall be barred by the fine, unless they omit to make their claim within five years after their titles accrue^b. So if an heir apparent be seised of lands, and the father levies a fine and dies, it shall not bar the heir, because he does not claim or derive any title to the land from his father; and therefore shall have five years to preserve himself from the fine^c.

But it is otherwise with respect to the issue in tail, they being privy to the tenant in tail both in blood and estate, and can make a title to the estate only as his sons; hence if a tenant in tail in possession levies a fine with proclamations, it will be an effectual bar to all his issue. So also if there be husband and wife tenants in special tail, and the husband levy a fine without the wife, this shall bar the issue though the son survive, because he must necessarily, in making out his title, show himself heir to the father as well as to the mother, and consequently be privy to the conusor within the statute^d. So, if there be grandfather and grandmother tenants in special tail, and the grandfather die, and the father enter upon the grandmother and levy a fine, the son is barred^e.

^b 2 Inst. 519.

^c 2 Inst. 523; 3 Co. 89, a.

^d Keilw. 205; Dyer, 251;

2 Inst. 681; 8 Co. 72; Hob.
257; *Beaumont's case*, 9 Co.

139, a; 2 Bendl. 50; Moor,
28.

^e Hob. 258, 339; 3 Co.
90; Moor, 145.

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So if lands be limited to an elder son in tail, remainder to his father in tail, and after the death of the father, the elder son levy a fine with proclamations, and die without issue, this will bar a younger son of the father; for as the remainder which was limited to the father in tail would descend, on his death, to his eldest son, and the younger son, in making title to this remainder, must claim through his elder brother, he by this means becomes privy to him both in blood and estate, and consequently is barred by his fine¹.

But if tenant in tail has issue a daughter, who levies a fine, and after a son is born, the fine shall not bar the son, because he may make himself heir to the entail without any mention of her, and can make out his title without conveying himself through her: and therefore as to the estate, he is a stranger to her, and may plead *quod partes finis nihil habuerunt*². So, if tenant in tail has issue two sons, and the eldest levies a fine and dies without issue in the life of his father, the second son shall inherit the entail notwithstanding the fine, because he need not mention the consor in making out his title to the entail³.

So if lands be given to a man and the heirs female of his body, who has a son and a daughter, and the son levies a fine and dies without issue, this will not bar the daughter, for though she is privy in blood to her brother, yet she is not privy to him in estate or title, as she can make her title to the estate without conveying her descent through him⁴.

If, however, this requisite both of blood and estate be complete, it matters not, though the tenant in tail be not nor ever was in actual possession of the estate, for though he have but a right of entail in him, or an entail in remainder only, or even a possibility of entail, his issue will be barred⁵. Thus, where A. was tenant for life, re-

¹ Co. Lit. 372, a.

689; Moor. 251.

² 3 Co. 61; Hob. 333.³ Shep. Touch. 21.⁴ *Bradstock v. Scovell*,⁵ See 1 Cru. 178.

Cro. Car. 434; Cro. Jac.

mainder to *B.* in tail, reversion to *B.* and his heirs, a fine levied by *B.* during the life-time of *A.* was held a sufficient bar to his issue, though he was but tenant in tail in remainder at the time¹. So where lands were limited to *A.* and his wife and the heirs of their bodies, *A.* died, leaving issue a son, who disaieised his mother and levied a fine with proclamations, and this fine barred his issue, although at the time of levying the fine he had but a possibility of an estate-tail during the life-time of his mother, for he is within the words of the act^m (1).

So where *A.* devised land to his wife for life, remainder to his son in tail, when he should attain to his age of twenty-five years; and before that time he levied a fine: this barred his issue, though he had nothing in remainder, as it was

¹ 3 Co. 84; Jenk. 274.

^m *Archer's case*, 3 Co. 90, a; Hob. 333.

(1) But when it is said that a fine is a bar to the heirs in tail, though levied by a person who never was actually seised of the estate-tail; or who had only a possibility of an entail at the time, this must be understood of *lineal* heirs only, for a fine levied by such person will not bar a *collateral* heir in tail of the person levying it; "for although in a lineal descent the issue in tail is barred by the fine of the ancestor, notwithstanding such ancestor have but a possibility of an estate-tail when he levied the fine, yet in a collateral descent the case is very different, as it is not necessary that the issue in tail should make mention of any collateral issue inheritable before him as in a lineal descent." *Mackwilliam's case*, Hob. 332; *Godfrey v. Vade*, W. Jones, 31. It is also to be observed, that when the issue in tail levies a fine in the life-time of his ancestor, tenant in tail, the tenant in tail himself may nevertheless afterwards levy a fine of the same land; and thereby bar as well such issue in tail as the conusee of the fine levied by such issue; in all cases, therefore, where it is said that the fine levied by the issue in tail during the life-time of the tenant in tail will bar the issue of such conusor, it is to be understood to mean when the tenant in tail dies without barring the entail, and suffers the estate to descend to the issue so levying the fine; 3 Co. 50, 51; 9 *Ibid.* 140; and see *Shep. Touch.* 26.

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allowed he could not have till that age; for though he was not actually tenant in tail when he levied the fine, but the vesting of the estate depended on the contingency of his coming to that age, yet the issue being obliged to make out his title through him, must be barred as a privy within the words of the 4 Hen. 7, c. 24, and the conusor was a person to whom the land was entailed, and so plainly within the words of the 32 Hen. 8, c. 36, which makes a fine levied of any lands entailed to the person so levying the same, or to any of his ancestors, a bar against him and his heirs^a.

So if *A.* be tenant in tail, the remainder to *B.* in tail, the reversion to the right heirs of the tenant in tail, and the tenant in tail bargain and sell the lands to *J. S.* and his heirs, and then levy a fine to him, this is a bar to the issue in tail; but it does not displace or discontinue the remainder in tail, because the bargain and sale conveyed no more than what the tenant in tail could lawfully grant, which was a descendible estate during his own life; and no estate of freehold passed by the fine, that being before conveyed by the bargain and sale; but yet the fine had the effect, though subsequent to the bargain and sale, to convey the whole estate-tail to the bargainee, who before had but a descendible estate during the life of tenant in tail; because wherever a fine is levied to a person to whom the lands were entailed, and whom the issue must mention in his *formedon*, such fine cuts off the entail, and bars the issue^b.

So where the tenant in tail had executed a feoffment of the land, and parted with all his estate before levying the fine, his issue was nevertheless held to be barred; for, *per Cur.* a fine with proclamations by the statute is not to be

^a *Johnson v. Bellamy*, Cro. Eliz. 122; *Grant's case*, cited 10 Co. 50; Cro. Eliz. 611; Cro. Car. 435; 2 Leon. 36; and see *Zouch v. Bam-*

field, 3 Co. 88; 1 Leon. 75; and *Hunt v. King*, Cro. Eliz. 610.

^b *Seymour's case*, 10 Co. 96; Buls. 162, S. C.

compared to a fine at common law, or a fine levied by other persons : it is sufficient that the fine was levied by the person who had the right of the estate-tail in him, or to whom the land was entailed, although he had no estate of freehold in possession, remainder or reversion in the land at the time^p.

So also, though the tenant in tail be disseised of his estate, and levy a fine during the disseisin, it will make no difference.

And although the tenant in tail dies before the proclamations are past, in which case a right always descends to the issue, because the fine is no bar till the proclamations are past, yet after the proclamations the entail is barred; for the proclamations distinguish the fines which bar the entail from those at common law, which only discontinue it; and by the express words of 32 Hen. 8, c. 36, all fines levied with proclamations of any lands entailed to the person so levying the same, or to any of his ancestors, shall immediately after the proclamation made be adjudged a sufficient bar against the said person and his heirs claiming only by force of the said entail^r.

Hence it was adjudged, that where *A.* was tenant for life, remainder to *B.* in tail, and *B.* levied a fine, and died before all the proclamations were past, his issue being out of the realm; that after the proclamations were past, though the issue, immediately upon his return into the kingdom, made his claim to the remainder, yet it availed him nothing, but the fine was a final bar to him^s.

So it was where there was grandfather, father and son; and the grandfather being tenant in tail enfeoffed the father, and afterwards disseised him, and then levied a fine with proclamations to *J. S.* but before the proclamations were all past, the father entered, and after they were all past,

^p *Hunt v. King*, Cro. Eliz. 437; *Smith v. Stapleton*, 2 And. 177; Moor, 628.

610. ^q 3 Co. 90, a; Jenk. 275.

^r 3 Co. 86; Plow. 430, ^s Case of Fines, 3 Co. 87.

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the conusee entered, and then the grandfather and father died, and the son brought his *formedon*; the conusee pleaded the fine with proclamations, and the demandant thereupon the entry of his father, but could recover nothing; because after the proclamations passed, the fine was a good bar to the entail which was made to the grandfather who levied the fine¹.

And the law is the same in case of actions brought, as of an entry made to preserve the entail; for if tenant in tail levies a fine, and dies before all the proclamations are passed and the issue in tail brings a *formedon*, the conusee may plead the fine with proclamations, though they were made pending the writ².

And this has been carried so far, that though a particular tenant, who is a stranger to the tenant in tail, should enter before the proclamations were past, to preserve his own right, yet the entail is barred; as if there is *A.* tenant for life, remainder to *B.* in tail, remainder to *C.* in fee, and *B.* disseises *A.* and levies a fine; but before the proclamations are passed, the tenant for life enters and avoids the fine as to himself and *C.*; though in this case, neither the estate of *A.* nor *C.* are affected by the fine, yet after the proclamations made, the entail is barred from the proclamations made, nor can any act of the issue preserve it³.

As tenant in tail may convey his whole estate by the fine, so may he carve any less estate out of it, which shall likewise bind the issue after his death; as if there be *A.* tenant for life, remainder to *B.* in tail, and *B.* agrees to make a lease for years to *J. S.* upon writ of covenant brought by *B.* against *J. S.* he may levy a fine *come cro.* &c. to *B.* and *B.* may render the land to *J. S.* for the term agreed on, with reservation of a rent; and this lease shall continue in force against the issue, because when *J. S.*

¹ *Hunt v. King*, Cro. Eliz. 589, 610.

² Cro. Eliz. 610; Poph. 65, 66.

³ 3 Co. 90; Plow. 435.

conveys by the fine, though he really has no right, the tenant in tail and his issue are estopped to say otherwise than that he took a fee-simple; and, consequently, it appearing by the fine that he was tenant in fee-simple, he has thence a power to make a lease to bind his issue^r.

Also, if a stranger levy a fine to tenant in tail, and he grant and render his estate to such stranger, the fine will bar the issue in tail^s.

But if there be tenant for life, the remainder in tail, and the tenant for life levy a fine *come ceo*, &c. to the tenant in tail, who grants and renders a rent-charge out of the lands to the conusor, this fine shall not bind the issue, because the rent was newly created by tenant in tail, and not entailed to him or any of his ancestors; and the entail of the land continuing, no encumbrance of the donee can affect the land any longer than his life^a.

But although a rent may be barred by a fine levied by the owner, yet a rent in the possession of a third person cannot be barred by a fine; and it is the same of a right of way or common, for these being rights only collateral to and issuing out of lands, they cannot be divested, for such things being mere creatures of law, and owing their existence purely by construction and intendment of law only, they are considered to be always in the possession of the persons who are by law entitled to such possession, notwithstanding any suspension of his actual enjoyment of them^b.

If tenant in tail of a rent-charge, issuing out of a manor, levies a fine of the manor, this by the opinion of

^r *Smith v. Stapleton*, Plow. 5 Co. 124, a; 1 Freem. 312; 430. Cro. Jac. 60; T. Raym. 149;

^s Jenk. 275.

^a And; 6; 3 Co. 82; Dy. *Goodright* ex dem. *Hare v.*

213; Plow. 435.

Board & Jones, cited 1 Cru. 295.

^b See *Shep. Touch.* 22;

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Hobart and Harvey, is a bar of the rent, because the fine being levied of the land, inclusively gives the rent^c (1).

And a fine levied of the entail of a trust estate will equally be a bar to the issue, as if levied of the legal estate^d.

So a fine levied by tenant in tail of an advowson in gross will bar his issue^e. But if tenant in tail of an advowson grant or render to another the nomination of a clerk to an advowson, by fine, this will not, it is said, bind the issue, because the right of nomination is a thing distinct from the advowson, and not, therefore, entailed^f (2). But in none of the cases we have mentioned, can the estate-tail be barred by a fine levied in any other court than the court of Common Pleas, levied with proclamations, in pursuance of the statute of Hen. 7, for if levied in any inferior court (unless it be by special custom) it will only have the effect of a fine at common law, which we have seen is to work a discontinuance only of the estate-tail, without barring the issue from bringing a *formedon*^g.

It may also be proper to notice, before we quit this head, that though a fine levied by tenant in tail will bar

^c *Helliot v. Saunders*, Cro. *Bagshot*, Ib. 278; 1 Fre. 311. Jac. 699; 1 Ves. 391.

^e Wats. Inc. 84.

^d See *Clifford v. Ashley*,
1 Ch. Ca. 268; *Salisbury v.*

^f Plowd. 435.

^g Com. Rep. 124.

(1) But *quære*, for there appears to be no fine levied of the rent, which being the thing entailed, and not the land, should, it would seem, descend to the issue till the entail thereof be barred by a fine; and see Plow. 435; but see also 1 Ves. 391; *Carter*, 22.

(2) It is, however, to be noticed to the student, that this doctrine has by some modern conveyancers been controverted, on the principle that the nomination and presentation to the advowson are in effect the same thing, being the fruit and profit of the patronage; and see 1 Cru. 188.

his issue, yet its operation is confined to that alone, and will not bar the rights of those in remainder or reversion, expectant on the failure of issue of the tenant in tail, (unless they fail to make their claim within five years after their right accrues), because the fine can pass to the conusee no greater estate than the conusor had in him, which was only an estate to him and the heirs of his body; upon the expiration of that estate, therefore, or in other words upon failure of heirs of the body of the conusor, the estate of the conusee will determine; unless indeed where the immediate reversion in fee after the expiration of the estate-tail is in the tenant in tail himself; in which case the fine will pass a fee-simple to the conusee; for the entail being destroyed by the fine, it becomes a mere particular estate, and being united with the reversion, it, like all other particular estates, is merged and extinguished in the inheritance^b. So if tenant in tail of an advowson grant by fine the nomination of a clerk to one and his heirs, so that on the church becoming void, the grantor may nominate a clerk to the tenant in tail and his heirs, and that he or they shall present the clerk so nominated to the ordinary; such a fine will not bind the issue in tail, because in this case the nomination and presentation are distinguished, so that the fine is not levied of the thing entailed^c.

The proper fine for barring an estate tail is that *sur concessione de droit come ceo*. The natural operation of this fine being to pass a fee-simple, but if the fine levied be that *sur concessit* or the like, it will bar the estate-tail so long as it continues in force, and be good against the issue in tail during the continuance of the estate which passes by the fine^d.

But the operation of a fine is not to be confined to the barring of estates-tail, the further object of the statute

Further operation of fines.

^b See 1 Show. 370; 4 Mod. 1; 1 Cru. 195. ^c *Rutland's case*, Cro. Ja. 40; Jenk. 321.

^d Plow. 435; 1 Cru. 188.

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4 Hen. 7. being to protect persons in possession of lands against all dormant titles. It is a rule, however, that no interest is barred by a fine that is not divested out of the owner; for if the person who had the right continues in possession at the time of the fine levied, he is under no necessity to make his claim, and cannot be put to his action or entry (which are the only remedies the act gives to avoid fines and secure the party's interest) because he being in possession, and not disturbed by the fine, has already all those remedies it can give him, and therefore it were unnecessary and fruitless to pursue them; as if a man levies a fine of land, out of which I have a rent, common, or the like, the fine and five years non-claim shall not affect me, because I am still in possession of my rent or common, and it were in vain to endeavour to recover what I still enjoy¹. And according to Lord Coke, the estate, in order to be put in a situation to be barred by a fine, must also be turned to a right; but this position, if the words "turned to a right," are understood in their technical sense, Mr. Cruise^m has properly observed is too general, for though no estate or interest can be barred by a fine unless it is divested out of the real owner, either before the fine is levied, or by the operation of the fine itself, that is, unless the real owner is turned out of possession of such estate or interest, yet it is not necessary that the right of possession should be gone, which is the meaning of the phrase "turned to a right," but it is sufficient that he has only a right of entry or action left in him^o.

Thus, if *A.* lease to *B.* for years, to commence after a former lease *in esse*; the first lease determines, and before any entry by *B.* the lessor enters and makes a feoffment,

¹ 2 Inst. 517; 9 Co. 106, a; Cro. Jac. 60; T. Raym. 149; 5 Cro. 124; Vent. 81; *Focus v. Salisbury*, Hard. 400; *Corbet v. Stone*, T. Raym. 217.

^m 1 Cru. 289.

^a Cow. Dict. "Divest."

^o See 2 Inst. 517; 5 Co. 123, b; 9 Co. 106, a; and *Sowell v. Zouch*, Plow. 355.

and levies a fine, and five years pass without any claim: *B.* is barred of his interest; for by the general clause the fine concludes all privies and strangers, and the first saving includes the lessee in respect of the word *interest*, which a term for years may properly be called^p. But if *B.* who had the future interest, had died before the determination of the first lease, and upon the expiration thereof the lessee had entered and levied a fine, and after the five years administration had been granted, the administrator should have been allowed five years to make his claim, for none had a right or title of entry before, and it accrued to him by the administration after the same, and consequently he must be allowed five years from the accruer of his right; but in the former case the lessee had a right of entry at the time of the fine levied, and therefore could have but five years from that time; but if the lessor enters upon the first lessee, and levies a fine, the second lessee shall have five years after the first lease is determined, because his right then first accrued^q.

So executors having lands devised to them till debts and legacies are paid, may be barred by a fine and five years non-claim, because they likewise have an interest within the words of the statute^r.

If there be tenant by *elegit*, statute-merchant or staple, and a fine be levied of those lands, and five years pass without any claim, they are bound by the fine, because they have each of them an interest within the words and intention of the statutes, and thereby shall be bound if they do not pursue their rights within five years^s.

And in the case of *Deighton v. Grenville*^t, all the judges

^p *Saffin's case*, Cro. Jac. 60; 5 Co. 124, 9 Ib. 105. ^r *Podger's case*, 9 Co. 105, a; 4 Ib. 124.

^q 1 Leon. 99; 2 Ib. 157; ^s 2 Inst. 517; 5 Co. 134, a; Cro. Jac. 61; 5 Co. 124, a; Plow. 374; *Oguel v. Lord Arlington*, Mod. 217. and see *Corbet v. Stone*, T. Raym. 140; 1 Cru. 214; also ^t 2 Vent. 333; Show. *Edwards v. Slater*, Hard. 410, 36; Skin. 260. 413, 415.

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agreed, that although the conusees of statutes-merchant did not enter, yet that they had possession in law, in consequence of their extents and *liberates*, which gave them a right of entry, and therefore they might be barred by a fine.

It is however to be observed, that the party must have extended the land, till which time he has no right to enter, and cannot therefore be put into possession¹; so it is of a conusee of a statute before execution sued; for though the judgment and execution be incumbrances that are chargeable upon the estate, yet before execution sued, the conusee, &c. has no right to the land, for his release of all his right to the land will not hinder him from suing out execution, and consequently he cannot be barred by a fine, unless he omit to make his claim in five years after the extent, for then his right first accrues².

So, if a man has a decree in Chancery to charge lands, and the tenant of the land, after the decree, aliens by fine, and five years pass, yet the plaintiff may have execution, because, till the decree be executed, he has no right to the land, and therefore is not obliged to make any entry or claim to preserve it till his title accrues³.

Right of entry.

A title of entry for a condition broken may be barred by a fine levied by the grantee or devisee of the conditional estate. Thus, where lands were devised to trustees and their heirs, upon condition that they should pay a certain sum of money every year for the support of a school-master, &c.; and, on non-performance of the trusts, the lands were devised over to other persons; the trustees neglected to perform the trusts, and levied a fine of the lands; it was determined that the fine was a good bar to the persons who had a title to enter on breach of the condition⁴. So a title of entry for a condition broken, may

¹ 1 Mod. 217.

² Ibid.

³ Chan. Cases, 268.

⁴ *Mayor of London v. Alsford*, Cro. Car. 575; 1 W. Jones, 452.

also be barred by a fine levied by the grantor of the conditional estate: as if a person makes a feoffment on condition, and before the condition is broken, the feoffor levies a fine of the same lands, either to the feoffee, or to any other person, the condition will be thereby discharged for ever⁷. Unless in the above cases the fine was levied for the purpose of corroborating the conveyance by which the condition was created, it will not destroy the condition; for in that case the fine and condition will be construed together, and will operate as one assurance^a.

A power appendant, or in gross, may be barred by a Power. fine levied of the lands to which the power relates, by the person to whom such power is reserved; because, by the fine, the person acknowledges all his right and interest in the lands to be vested in another; and therefore it would be repugnant to that acknowledgment that he should ever afterwards claim any power over those lands. Besides, a power appendant, or in gross, being part of the old dominion, is considered as an interest, which may be released^a. Thus where one, being seised in fee, covenanted to stand seised to the use of himself for life, remainder over, reserving to himself a power of revocation, by deed indented and enrolled; and then revoked the uses, and levied a fine; it was resolved that the fine had destroyed the power^b.

And a power of revocation may also be destroyed in part, by levying a fine of part of the land, and yet continue good as to the residue^c.

But if a person who has a power appendant, or in gross, levies a fine of the lands to which the power relates, and afterwards by deed declares that such fine shall enure as

⁷ Shep. Touch. 154.

^b Digges's case, 1 Rep.

^a Cromwell's case, 2 Rep. 173.

69; and see *Thomasin v. Mackworth*, Carter, 71.

^c 1 Inst. 215, a; Shep. Touch. 501.

^a 1 Inst. 237, a; 3 Rep. 83, a.

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an execution of his power, such fine will not destroy the power, because the fine and declaration of uses will in that case be considered as one assurance^d, and operates therefore as an execution, and not as an extinguishment of the power^e.

But a power collateral to the land, which is not joined with an interest, cannot be destroyed by a fine levied by the person to whom such a power is reserved, because it is considered as a bare and naked authority, which cannot be released or divested. Thus it is said by Lord Chief Justice Popham, in *Digges's* case, that if a feoffment was made to *A.* in fee to divers uses, with a proviso that it should be lawful for *B.* to revoke those uses, *B.* could not in that case release his power, nor extinguish or destroy it by a fine, because it was a collateral power; for the land did not move from him, nor would the party have been in by him, if he had executed the power^f. Nor, upon the same principle, can such power be barred by the fine of a stranger. Where, therefore, a person gave his wife a power to dispose of 100*l.* to such persons as she should appoint, to be paid within one year after his decease; the wife, after the death of her husband, made an appointment of this sum; and the heir of the husband levied a fine of the land, and five years passed, afterwards the appointees of the 100*l.* brought their bill to be paid that sum; Lord Hardwicke observed, that although by the several statutes relating to fines, all right, claim, and interest which strangers had were barred by a fine, yet that such a stranger as *M.* who had no interest, but only a bare naked power, and who could not have made an entry, was not affected by it^g.

^d *Herring v. Brown*, 2 Show. 185; 1 Ventr. 368; Carth. 22; Comb. 11; Skin. 184; 1 Freem. S. C.; *Doe v. Whitehead*, Dougl. 45, S. P.

^e *Doe v. Whitehead*, Dougl.

45.

^f 1 Inst. 237, a; 1 Rep. 174, a.

^g *Willis v. Shorral*, 1 Atk. 474.

Further, a fine and non-claim is a good bar to a writ of error, in consequence of the word *actions*, in the second saving of the statute 4 Hen. 7, and so has a fine been held to be a bar to a writ of error to reverse a common recovery^b.

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Writ of error.

The estate of a copyholder is holden to be an interest within the words of the statute Hen. 7, and may therefore be barred by a fine levied by the person having the freehold of the lands. Thus if a copyholder be disseised, and the disseisor levy a fine with proclamations, both the copyholder and the lord will be barred of their estates, unless they make their claim in due time¹. So if the copyholder make a feoffment in fee, and the feoffee levies a fine with proclamations, and five years pass without claim, the lord will be barred, for the purview of the act is general, declaring a fine to conclude as well strangers as parties and privies, and the words, "right, claim and interest," used in the saving, clearly extend to copyholds².

But an entail of a copyhold cannot unless by special custom be barred by a fine, because a copyholder cannot implead or be impleaded in the king's courts, and a fine levied in pursuance of 4 Hen. 7, must be in the court of Common Pleas and not elsewhere¹.

Terms for years may also be barred by a fine levied of the inheritance, if the lessee be in possession. Thus, if lessee for years assign his term in trust for himself and afterwards purchases the inheritance and occupies the land, and then levies a fine, and five years pass without claim by the assignee, the term is lost, for neither the *cestui que trust* nor the termor have any remedy: not the *cestui que trust*, because he by the fine hath acknowledged the land to be the right and inheritance of the conusee; and it were unreasonable to allow him any pretensions after so solemn a confession to the contrary: not by the

^b Shep. Touch. 34.¹ Co. Copyh. s. 55.² See *Podger's case*, 9 Co.

104.

¹ 1 Cru. 211, 213.

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termor, because he having a right at the time of the fine levied, and omitting to make his claim within five years, is barred by the express words of the statute^m. So it is, if tenant in fee-simple makes a lease for one hundred years to attend the inheritance in trust for himself, and still continues in possession, and then makes a lease for fifty years, and levies a fine *sur conusance de droit* to confirm it, and five years pass without any claim by the first lessee; his interest is barred by the fine, for the second lease and the fine divested the first term out of the lessee, and consequently, if there be no claim by him in five years, his interest must be barredⁿ.

But if a man make a lease or demise for years, and still continues in possession, he is considered as tenant at will to the lessee for years; and a fine levied by him, whilst so in possession, will not operate to bar the term, because the possession of the tenant at will being the possession of the person in remainder, his interest is not divested^o. Thus where the owner of the inheritance of land created a term of five hundred years in trust for himself for life, and then for his brother, and afterwards, when in possession under the trust, covenanted to stand seised of the same lands to similar uses, and levied a fine; and, upon a question whether the term of five hundred years was barred by the fine and non-claim, Sir Matthew Hale held not, for the lessor continuing in possession by permission of the trustees, he was only tenant at will to them, and the estate of the termor was not divested or displaced, and the fine therefore had no operation^p. So if a man purchases the fee-simple of lands, of which there is a long term in being, and the conveyance is made by fine, and the purchaser, to protect the inheritance, has an assignment of the term in

^m *Isham v. Morris*, Cro. Car. 110.

^o See 1 Cru. 216.

^p *Focus v. Salisbury*, Hard.

ⁿ Lev. 270; *Freeman v. Barnes*, Sid. 478; Vent. 80; Chan. Rep. 51, 65.

400; and see *Corbet v. Stone*, T. Raym. 140.

trust for himself, though the termor makes no claim in five years, yet the term continues ; because the statute of fines being made for the security of purchasers, they would weaken their interest, if fines destroyed such leases against the intention of all parties¹. And hence it is to be considered as a general rule, that terms for years which are kept on foot by purchasers for the purpose of protecting the inheritance, will not be barred by a fine levied by the owner of the inheritance.

But a term vested in trustees for any other purpose than that of protecting the inheritance, may be barred by fine and non-claim ; as where *A.* had a term vested in him for securing children's portions, *B.* being in possession of the land levied a fine, and five years passed without any claim being made, and it was resolved by the court that the term was barred².

Also, if a man mortgages his land, and, as is usual, still continues in possession, and levies a fine, and five years pass, yet the mortgagee is not barred ; for though the mortgagee be in reality out of possession, yet when that is done by the consent of both parties, and the nature of the contract requires it should be so while the interest is paid, it is against the original design of the contract, that any act of the mortgagor, except the payment of the money, should deprive the mortgagee of his security, and is no less than a fraud, which the common law will not countenance³. So, if the mortgagee is in possession, and levies a fine, and the five years pass, yet upon payment of the money the mortgagor may enter⁴.

It is agreed on all hands, that a fine and non-claim will bar a trust, because the *cestui que trust* has an equitable Trust estate.

¹ *Norfolk's case*, 3 Ch. Ca. 1 Sid. 460 ; 1 Vent. 82 ; 1 Lev. 272 ; 1 Cru. 215. ² *Weldon v. Duke of York*, 1 Vern. 132, and there said to be a new way of fore-

³ *Hammer v. Eyton*, Comb. 67 ; 1 Ch. Rep. 27, 33. ⁴ *Weldon v. Duke of York*, 1 Vern. 132, and there said to be a new way of fore-

⁵ Sid. 460 ; Vent. 82 ; 189. ⁶ Lev. 272 ; 2 Ves. 482.

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interest, and therefore ought to pursue it by proper remedies to secure it^a. As if *A.* be seised of lands in trust for *B.*, and a third person enter and levy a fine with proclamations, and five years pass without claim, it will bar the estate of his *cestui que trust*, as well as of the trustee. This doctrine must, however, be applied with some distinction.

As, 1. Where a purchaser has notice of the trust, though the trustee conveys to him by fine, and five years pass without any claim by the *cestui que trust*; yet the trust is not barred, because where the purchaser has notice, he sees the title of the vendor, and what power he has to convey; and therefore, when he takes the land from him, shall be presumed to hold it in the same plight; and the vendor could not make him a better title than he had in himself; and when the purchaser takes it upon these terms, the trust is undisturbed, and the interest of *cestui que trust* no way affected by the fine^a.

So where a person to whom lands were devised chargeable with legacies, levied a fine, on which there was a five years non-claim, and afterwards granted a rent-charge, and mortgaged the lands; it was decreed, that the fine and non-claim were no bar to the legatees, because the devisee having no title but under the will, must have had notice of the legacies^b.

But it is to be observed, that in these cases of a fine not being a bar of a trust by reason of notice in the purchaser, the fine itself is not void or voidable on that account; but the purchaser or person to whom the fine is levied, either without consideration, or with notice of the trust, stands in the place of the trustee, and will be decreed to hold in trust for the beneficial owner of the estate^a.

^a *Clifford v. Ashley*, 1 Ch. Ca. 268; 2 *Ibid.* 247; *Salisbury v. Bagot*, 1 *Ibid.* 276; 1 *Freem.* 11.

^a *Gilb. Ch.* 62; but for this see 1 *Vern.* 149.

^b *Drapers Company v. Yardley*, 2 *Vern.* 662.

^a 1 *Cru.* 210.

2. Though the trustee should convey by fine to a purchaser, who had no notice, and thereby and five years non-claim the *cestui que trust* should be barred, yet if the purchaser re-convey to the trustee, the bar by the re-conveyance ceases, and the trust revives again; for he that was originally invested with a trust shall never be allowed to plead his own tortious act in his justification, for that were to allow a man to plead his crime in his own defence and excuse of his treachery^a.

And, so in general, a fine levied by a trustee shall not be allowed to affect the interest of the *cestui que trust*^b. Thus, in the case of *Shields v. Atkins*^c, Lord Hardwicke said it would be dangerous, where a person enters on the foot of the trust, and never makes any declaration of his having performed the trust, to construe this such an entry, as that a fine and non-claim afterwards would be a bar. And in the case of *Lord Pomfret v. Lord Windsor*^d, his lordship observed, that a court of equity would not suffer a fine levied by a trustee to bar an equitable right; and that if a practice of this kind was allowed to prevail, a court of equity might as well be abolished by act of parliament.

A *cestui que trust* may levy a fine and bar his own estate. Before the statute of uses, indeed, if a *cestui que use* had levied a fine, it might have been avoided at any time by the plea *quod partes finis nihil habuerunt*; as the *cestui que use* had no estate in the land, but was barely tenant at will to his feoffees^e. But modern chancellors have very much altered the law in this respect, having laid it down as a general rule, that any legal conveyance or assurance by the *cestui que trust* shall have the same effect and operation on the trust estate, as it would have had on the legal estate, if the trustees had conveyed it to the *cestui*

^a *Bovey v. Smith*, 2 Ch. 124, 125, 126; 1 Vern. 60, S. C. ^d 2 Ves. 481; 2 Atk. 631, S. P.

^b *Ibid.* 1 Vern. 149. ^c Year Book, 27 Hen. 8, 20; Bro. Abr. tit. Fine, pl. 4.

^e 3 Atk. 563.

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que trust. So that now a *cestui que trust* in tail may by a fine duly levied, bar his issue as fully, as if he had the legal estate; for otherwise trustees by refusing, or by not being capable of executing their trust, might prevent the tenant in tail from exercising the power given him by the law over his estate, which would be extremely inconvenient, and would tend to the introduction of perpetuities^f.

And so a *cestui que trust* in tail may not only bar his own issue by a fine, but also the persons in remainder or reversion, unless they make their claim within the time specified by the statute^g.

Springing use.

A springing or shifting use cannot be barred by a fine levied of the estate out of which such springing or shifting use is to arise, unless by non-claim for five years after it arises^h.

Therefore, where two coheirs, on the marriage of one of them, conveyed their estate to trustees to the use of the intended husband in fee, subject to a proviso that in default of issue, if the heirs of the wife should pay to the heirs of the husband a certain sum, the remainder in fee limited to him should cease, and be to the use of the right heirs of the wife. Afterwards the husband and wife levied a fine for the purpose of extinguishing the wife's right under the proviso, and settle the estate on the husband and his heirs. But it was held to be no bar, for it was said that this proviso was within the reason of the limitations allowed in the *Duke of Norfolk's* case, where it was said that future interests, springing trusts, or trusts executory, and remainders to arise upon future contingencies, were wholly out of the rule and reason of perpetuities, if they are not of remote consideration, and such as would speedily wear out; and that the fine could not bar the benefit of

^f 1 Chan. Ca. 213; Cases temp. Talbot, 43.

^h *Loyd v. Carew*, Show. P. C. 137.

^g *Basket v. Pierce*, 1 Vern. 226.

this proviso, because the same never was nor could be in the wife, who levied the fine.

Dignities and titles of honour, having relation to some place, are entailable by the crown, as tenements within the statute *de donis*, yet neither the donee nor his issue can bar the entail, either by fine or other means, either with respect to the right of any person claiming under the person levying the fine, or the person himself who levied it¹.

Dignities.

A further effect of fines is the passing estates and interests of married women in the inheritance or freehold of lands and tenements (1). The common law, we have seen, invests the husband with a right over the whole of the wife's personalty, and entitles him to the rents and profits of her real estate during the coverture; it further gives him an estate for his own life in her inheritance, if he was actually in possession, and there is born any issue capable of inheriting; but the same law which confers so much on the husband, will not allow the wife, whilst a feme covert, to enlarge the provision for him out of her property, or to strip herself of any claims which the law gives her on his; on the contrary, jealous of his great authority over her, and fearful of his using compulsion, it creates a disability in her to give her consent to any thing which may affect her right or claims after the coverture, and makes all acts of such a tendency absolute nullities: by the rigour of the ancient law, this rule appears to have been so universally applicable, that a married woman

Fine passes the estates of femes covert.

¹ *Purbeck's case*, Show. P.C. 11; 1 Co. Lit. 20, a, n. (3).

(1) And this effect is not confined to fines levied conformably to the statute of Hen. 7, but extends to every kind of fine, as well without as with proclamations; and whether levied in the court of Common Pleas or in an inferior court, they derive their operation in this respect from the principles of the common law. 1 Cru. 208.

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could in no case bind herself or her heirs by any direct mode of alienation^k. But afterward, two indirect modes were allowed, namely, fines and common recoveries; for though it might be proper to incapacitate the wife from being influenced by the husband to prejudice herself by any conveyances or agreements during the coverture, yet justice to others required that such as had any claim on the wife's freehold or inheritance, should not be forced to postpone their suits till the marriage was determined; and hence the common law allowed a judgment against the husband and wife in a suit for her land to be as conclusive as if given against a feme sole; which was carried so far, that, till the statute of Westminster the second, judgment against them, even on default in a possessory action for the wife's freehold, drove the wife after the husband's death to a writ of right to recover her land^l. From enabling the husband and wife to defend her title, and making the judgment on such defence to be conclusive, permitting them to compound the suit by a final agreement of record in the same manner as other suitors, was no great or difficult transition, more especially when it is considered, that in the case of femes covert fines are never allowed to pass without a secret examination of them apart from their husbands, to ascertain whether their consent be the result of a free choice, or of the husband's compulsive influence. Such then^m, appears to be the true source, whence may be derived the present force of fines and common recoveries as against the wife, who joins in them; for, whatever in point of bar and conclusion was their effect, when in suits really adverse, of course attended them, when they were feigned, and in that form they gradually rose into modes

^k See Co. Lit. 121, a. n. (1);
^l Blac. Com. 442; but see
 also Mad. Form. Anglic.
 No. 148, 149; Reev. E. L.
 91, whence it should seem
 that the wife's right to dower

in the lands of her husband
 might formerly have been
 barred by a feoffment made
 by him with her assent.

^l See 2 Inst. 342.

^m Co. Lit. 121, a, n. (1).

of alienation, or, as the more usual phrase is, common assurances. This mode of accounting for a married woman being permitted to alienate her real rights by fine, though not by any instrument or act strictly or nominally a conveyance, leads to proving, that the common notion of a fine's binding *femes covert* merely by reason of the secret examination of them by the judges is incorrect; for if the secret examination was of itself so operative, the law might, and surely would, provide the means of adding that form to ordinary conveyances, and so make these conclusive to *femes covert* equally with a fine; but it is clearly otherwise: and, except in the case of conveyances by custom (1), there must be a suit depending for the freehold or inheritance, or the examination, being extrajudicial, will be ineffectual^a. The just explanation, therefore, of the subject seems to be, that the pendency of a real action for the freehold of the land, in consequence of previously taking out an original writ, (without which preliminary even at this day a fine is a nullity) should be deemed the primary cause of the fine's binding a *feme-covert*, and that the secret examination of her, on taking the acknowledgment of the fine, is only a secondary cause of this operation^b, a conclusion which receives much countenance from the circumstance of a wife being allowed at the common law to levy a fine by attorney, in which case it is hardly to be conceived that she could have been previously examined as to her consent^c (2).

^a 2 Inst. 673; Keilw. 4, a, ^b See Glanv. l. 2, c. 3;
to 20, a. 1 Cru. 108, 201.

^c Co. Lit. 121, a, n. (2).

(1) By the custom of London and some other cities a married woman may bar herself by deed enrolled, in which case she is privately examined; and this custom, with respect to the city of London, is confirmed by 34 & 35 Hen. 8, c. 22; and see Hob. 225.

(2) But yet, *quære*, for the force of the warranty contained in the fine should seem to be on account of the private

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But upon whatever principles the doctrine of a fine's binding a feme covert was originally founded, it is now fully established that by joining with her husband in levying a fine of any lands of which the husband is seised in her right, she may completely bar herself and her heirs; and the estate in such case passes wholly from the wife, and not from the husband, who is named in the fine (so far as respects her interest) merely for conformity, the fine being considered as the act of the wife, and not of the husband, and the conusee is in by her only, insomuch that although she levy the fine without the concurrence of her husband, yet if he does not enter during the coverture, it will bar her after his death¹; and so if the fine be reversed, the whole estate becomes again vested in her as before².

Dower.

But though it was always admitted that a fine levied by a feme covert of her own inheritance, would be a complete alienation, and an absolute bar to her and her heirs, yet it was formerly held that it would not bar the right to dower which the law gives her in the estate of her husband, because in the life-time of the husband, this is but a contingent and uncertain interest, depending upon the event of her surviving him; a different mode of reasoning has since, however, prevailed, and it is now an established doctrine that the wife's joining with her husband in levying a fine of his estate will, unless a contrary intent be expressed, bar her of all right to dower out of such estate; for having no interest in the lands comprised in the fine in her own right, the fine, unless the contrary appear, must be supposed to be for the purpose of barring that which she has

¹ Dougl. 44.² 2 Co. 57, b. 77, b.

private examination, for it is no part of the judgment; and that a feme covert may bind herself by warranty, even in a fine *sur concessit* has been expressly holden, and an action of covenant will lie against her upon such warranty. See *Wootton v. Hale*, 1 Mod. 290; 2 Saund. 180.

in right of her husband, viz. her claim to dower upon his decease*.

So also will a fine levied by her, alienate or bar her right to any other estate or interest which she may have in the lands of her husband comprised in the fine; as where a man, on his marriage, entered into a bond and judgment to a trustee for payment of a sum of money to his intended wife if she should survive him, and the wife afterwards joined with her husband in levying a fine of all his lands, it was holden that the fine barred her interest in the judgment upon the bond, as well as her claim to dower out of the husband's lands†.

So a fine levied by her of the lands settled upon her for a jointure will be a destruction of such joint estate‡.

But in all these cases, where the fine has been said to bar the rights of a feme covert, it is to be understood that the fine was levied with that intent; or at least that no contrary intent appear, for if it were not levied with an intent to alienate or bar such right, it will be prevented by the courts of equity from having that effect. Where, therefore, a person, upon his marriage, settled a rent-charge on his wife for her life, and afterwards she joined with her husband in levying a fine of the lands chargeable with the payment of it, for securing the repayment of money to a mortgagee, and the rent-charge was excepted in the conveyance, it was decreed by the Court of Chancery that this rent-charge should not be barred or affected by the fine§.

So where a jointure was made to issue out of certain houses which were afterwards burnt down, and the wife joined with her husband in levying a fine of the land for

* See Glanv. l. 11, c. 3; 173; 1 Leon. 285; Dy. 358, 10 Co. 49, b. pl. 49.

† See *Goodrick v. Shotbolt*, 1 Solley v. *Whitfield*, Rep. Pre. Ch. 333; Gilb. Rep. 18. T. Finch. 227; *Nayler v*

‡ Co. Lit. 36, b; 1 Bulstr. *Baldwin*, 1 Rep. C. 8vo. 131.

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the purpose of raising money to rebuild them, this was held not to affect her jointure, it having been agreed at the time, that her jointure should be payable out of the rents of the new houses when built¹.

Lands of corporations.

And whether the estates and interests which may be thus barred or affected by fine and non-claim, belong to natural persons or civil corporations, the operation of the fine will be the same. For the statute 4 Hen. 7, was made for the public good, and to settle mens inheritances, and the words of it ought therefore to be construed in the most extensive sense for the benefit of those who are in possession of lands, and for barring the rights of all persons who are remiss in making their claims; so that although the words of the statute extend to natural persons only and their heirs, and no mention is made of any corporation or successors, yet it must be supposed to have been the intention of the legislature that it should extend to such corporations as had in themselves an absolute estate and power of alienation².

But it is otherwise, as we have before seen, of ecclesiastical corporations, and others seised of lands in right of their churches, these being restrained by positive statutes from alienating any of their possessions to the prejudice of their successors³. But a bishop, dean, vicar or prebendary may be barred with respect to his own life estate in lands of which he is entitled in right of his bishopric, &c. if a fine be levied of them, and he neglect to make his claim within the five years.

Lands of the crown.

So the king cannot be barred by a fine and non-claim for *nullum tempus recurrit regi*, the law supposing him to be so perpetually employed for the public good, as not to be able to attend to his private interest; hence no delay or

¹ Skin. 238; *Brind v.*
Brind, 1 Vern. 213.

² *Croft v. Howell*, Plow.
536.

³ *Mag. Col. case*, 11 Co.
78, b; 1 Rol. Rep. 151;
Howlett v. Carpenter, 3 Keb.
775.

omission on his part in making his claim within the time limited for others, shall bar his rights^b (1).

So it has been resolved in the construction of 34 & 35 Hen. 8, c. 20, that a fine levied by tenant in tail of the gift of the crown, where there is a reversion or remainder in the king, shall not bar the issue in tail, or affect such remainder or reversion^c.

A fine has also various other operations besides those already noticed; as,

1. A fine being equipotent with a judgment of a court of *Estoppel*. record, and all persons who are parties to it and their heirs being for ever concluded from averring any thing derogatory to it, it will operate as an *estoppel* or perpetual bar against the persons and their heirs from claiming any estate or interest contrary to the fine. Thus, though we have seen that no one can levy a fine of lands but one who has the freehold, yet if it be levied by a termor, it will be good against himself though void as to strangers, and will operate as an *estoppel* against his claiming any thing in the lands afterwards^d.

So if a person levy a fine of a future right, as a contingent remainder, or a possibility, it will bar him, and all claiming under him, by way of *estoppel*, from claiming his right when it accrues, though, he having no estate in the land at the time, it passed no interest^e. So where lands were devised to two trustees and the survivor of them, and

^b Plowd. 538.

¹ Burr. 95; Pollexf. 54.

^c Co. Lit. 372, b; T. Raym. 349; Sir T. Jones, 252.

^e See *Weale v. Lower*, Pollexf. 54; Fearn's C. R.

^d Co. Lit. 251, 325, a; 287.

3 Co. 88, 90; 5 Ibid. 123;

(1) An exception to this rule is, however, made by 9 Geo. 3, c. 16, by which, for the quiet of people's possessions, the king is disabled from suing for any manors, lands or hereditaments where the right has not accrued to the crown within sixty years thence preceding.

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the heirs and assigns of the survivor, and it was objected that the trustees could not make a good title to a purchaser, they not having a fee-simple under such devise, but only an estate of freehold during their joint lives, with a contingent remainder in fee to the survivor of them, the Lord Chancellor said, that a fine levied by the trustees would ensure a title to the purchaser, by estoppel, *i. e.* would estop or preclude the survivor from claiming the fee-simple which would accrue to him upon the decease of his companion^f (1).

Release and
confirmation.

A fine will also, in some cases, operate as a release of the conusor's right; or as a grant; or a confirmation of a preceding estate in the conusee, according to the quality of the estate of which it is levied; as if one joint-tenant levies a fine of the land, this will operate as a release of his part to his companion^g. But if one coparcener in tail levy a fine *come ceo*, it will not enure by way of release, but by way of grant, because a fine is a feoffment of record, and one coparcener may enfeof another; it will also, in this case be a discontinuance and alteration of the estate^h. If tenant in tail bargain and sell his estate-tail in fee, and then levies a fine to the bargainee, the fine will operate as a confirmation of the estate which passed by the bargain and saleⁱ. So if tenant in tail make a lease not warranted by the statute, or confess a judgment, execute a mortgage or other encumbrance, and afterwards levies a fine, it will operate as a confirmation of such encumbrances^k. And so likewise if a tenant for life and the remainder-man in tail join in granting a rent-charge

^f *Vick v. Edwards*, 3 P. Wms. 372.

^h Co. Lit. 199, b, n. (83+).

ⁱ *Seymour's case*, 10 Co.

^g *Eustace v. Scawen*, Cro. Jac. 696.

95.

^k 1 Eq. Ca. Abr. 257.

(1) But see objections to a fine being levied by such trustees, Fearn. C. R. 283, and Co. Lit. 191, a, n. (78) also *ante*, vol. 3, c. 11, s. 5.

in fee out of the land, and then levy a fine to another, the rent, which was before determinable, will be confirmed by the fine¹.

Revocation.

A fine will also operate as a revocation of a devise previously made of the land of which it is levied, upon the principle that, being an alteration in the devisor's estate, it evinces an intention in him to vary the disposition of it². But where this reason does not apply, as when it is levied to confirm and establish the estate of the devisor, it will not operate as a revocation³.

A fine will also, in some cases, operate to give a new estate to the conusor, as a fine *sur grant et render*; this fine, as has been before observed, being in the nature of a feoffment by him to the conusee (1), and a re-*enfeoffment* by the conusee to the conusor. If, therefore, a person be seised of an estate, *ex parte materna*, and in a fine of this kind take back upon the render, an estate to him and his heirs, the estate will thenceforth descend to his heirs *ex parte materna*, because he by this means takes a new estate in the nature of a purchaser⁴ (2).

¹ *Holbeach v. Sanbeach*, *Tickle v. Tickle*, cited 3 Atk. Winch. 102. 742.

² See *post*, tit. Devise, and 1 Inst. 31, b; *Price v. Langford*, 1 Show. Rep. 92; 3 Wils. 12.

³ See *post*, and *Luther v. Salk*. 140; Rep. temp. Holt, *Kirby*, 3 P. Wms. 169; 253.

(1) The seisin of the conusee of this fine has, however, been held to be an instantaneous seisin only, and does not therefore entitle his wife to dower out of the land. 1 Inst. 31, b.

(2) But this species of fine, *sur done, grant et render*, the student is to observe, is the only fine which gives a new estate to the conusee, for if a person seised *ex parte materna*, as above mentioned, levy a fine *sur conusance de droit come ceo*, to the use of himself and his heirs, the land will nevertheless continue to descend to his maternal heirs, because it is still the old use, which will follow the nature of the land, and descend as the land would have gone if no fine had been levied of it. 1 Salk. 590; 2 Wils. 19; 2 P. Wms. 139.

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Let in encum-
brances.

A further effect of a fine is when levied by a particula tenant to destroy his particular estate and let in the reversion, with its encumbrances, if any subsist upon it. Thus, if there be tenant in tail, with the immediate reversion to himself in fee, and he levy a fine of his estate, the estate-tail will be extinguished and merged in the reversion, and the reversion being by this means brought into immediate possession, it will become liable to the encumbrances of all those who were previously seised of it, as well as of him who levied the fine. If, therefore, such tenant in tail encumber his estate, and his heir in tail levy a fine, this will make him liable to discharge the encumbrances; for by extinguishing the intail, he lets in the reversion, and of course all the charges to which it was subject^p. So where a person tenant in tail, with remainder in fee, made a lease to commence *in futuro*, (which a tenant in tail has no right to do) and died, leaving issue a son, who before the commencement of his lease levied a fine, this was held, by barring the estate-tail, to let in the remainder, and confirm the lease^q.

So also where a person who is tenant for life, remainder to his first and other sons in tail, reversion in fee to himself, encumbers his estate, and his son upon his death levies a fine, this will let in the reversion in fee; and make it liable to the encumbrances of his father^r.

Forfeiture.

Lastly, a fine, *come ceo*, if levied by a person who is tenant for life only of the land, operates as a forfeiture of his estate, as divesting the remainder or reversion, and being an attempt to create a greater estate than he can lawfully convey, and also as amounting to a renunciation of the feudal connexion between him and his lord^s. So if

^p 1 Atk. 51.

^q See *Symonds v. Cudmore*, 1 Show. 370; 1 Salk. 338; 4 Mod. 1; and see *Earl of Shelburne v. Bidulph*, 4 Bro. Par. C. 594.

^r *Kinaston v. Clark*, 2 Atk. 204; but *contra*, had he suffered a recovery; *Ibid.* ^s See *ante*, vol. 2, p. 162; Co. Lit. 251, b; Prec. Ch. 591; Gilb. Ten. 38.

he accept such fine, it will equally incur a forfeiture upon similar principles; for though this acceptance does not divest the estate of him in reversion or remainder, yet it is a renunciation of the tenancy, by affirming, on record, the reversion to be in a stranger¹.

Where, therefore, *A.* was tenant for life, with remainder to *B.* for life, and *A.* levied a fine to *B.* it was adjudged a forfeiture of both their estates, for by their own act, and on record, they had denied the reversion to be in the lord, the one by giving and the other by receiving it².

So where *A.* was tenant for life, remainder to *B.* for life, remainder to *C.* in tail, remainder to *B.* in fee, and *B.* the second tenant for life levied a fine *come ceo*, &c. to a stranger, it was adjudged to be a forfeiture of his remainder for life, and that upon the death of *A.*, *C.* the next in remainder to *B.* might enter, because this species of fine, as has been before observed, supposes a prior gift in fee-simple, which he could not lawfully make, whilst the estate for life of *A.* and the remainder in tail to *C.* were subsisting; and though *A.*'s remainder in fee at the time the fine was levied, was only contingent, i.e. expectant on the death of *C.* without issue, yet according to the doctrine before stated, the fine passes a fee-simple in possession by estoppel³.

And if such tenant for life be of a rent, a common advowson, or other incorporeal hereditament lying in grant, it will be the same; for though in this case the reversion is not divested, yet it being a solemn and public renunciation of the estate for life, in a court of record, it is held to amount to a forfeiture⁴.

But where the person who has the next estate of inheritance joins with the tenant for life in levying the fine, it will be no forfeiture, because done with the concurrence

¹ Co. Lit. 252, a; & *ibid.* n. (1); 9 Co. 106, b.

² *Garret v. Blizard*, 1 Rol. Abr. 855.

³ *Smith v. Abell*, 2 Lev. 202; Co. Read. 3.

⁴ Co. Lit. 251, b; 1 Cru.

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of him who alone could be injured by it; each party therefore in this case is construed to pass his own particular interest, and in that order of time which the law allows, namely, first, the person in remainder, and then the tenant for life^a.

But this operation of a fine, however, in incurring a forfeiture of an estate for life, must, in every instance which has been put, be understood as said of a fine *sur consusance de droit come ceo*, &c. or a fine *sur done, grant et render*, and not of a fine *sur consusance de droit tantum*, or *sur concessit*, because these latter fines do not, like the two preceding ones, suppose a prior gift in fee, but operate merely as a grant of the particular estate which the conusor has in him, without divesting the estate in remainder or reversion^a. They must also be understood to be levied by those who possess or may possess the legal estate in the land, and not by persons who are *cestui que trusts* only of the land; for as a fine levied by a *cestui que trust* cannot divest or affect the remainder or reversion, such a fine is construed in equity to pass such interest only as the conusor has a lawful power to dispose of^b.

And it is said by Coke, that a fine levied by a copyholder will be an absolute forfeiture of his estate, and his estate being absolutely gone, and not voidable only, no assent or act of the lord can operate as a waiver of the forfeiture^c.

VIII. THE MEANS BY WHICH A FINE MAY BE AVOIDED.

WITH respect to this head of inquiry, it is to be observed, that at the common law there were four modes of

^a *Bredon's case*, 1 Co. 76; 1 Vent. 160.

^b *Pigott v. Salisbury*, 2 Mod. 109.

^c 2 P. Wms. 146; 3 Atk. 729.

^d Sup. to Co. Copyh. c. 11; but see *Doe v. Hillier*, 3 Durnf. & East, 162.

avoiding a fine; viz, two by matter of record, and two by acts *in pais*. Those by matter of record were, 1. a real action commenced within a year and a day after the fine was levied; and 2. an entry of a claim upon the foot of the record of the fine itself. Those by acts *in pais* were, 1. a lawful entry upon the land; or, if that could not be done, then, 2. by a continual claim. But now, by 4 Hen. 7, c. 24, it is enacted, that all persons affected by a fine levied with proclamations, in pursuance of that act, shall pursue their title by way of action, or lawful entry; so that now an entry of claim upon the record of the fine would be ineffectual, to avoid a fine levied under that act⁴.

And a fine being considered as a judgment given in a court of record, it may also be avoided by a reversal of such judgment in a writ of error, to be brought by the person who would have been entitled to the land if the fine had not been levied, either in the court where the judgment was given, if the error arise from some defect of process, or matter of fact; or, if from any erroneous opinion of the judges, then in some court which has an appellant Jurisdiction over such court: or a fine may be avoided even by simple application to the court where the matter is pending, if made before the fine is wholly complete; or, although it be complete, if obtained by trick or surprise⁵.

But 1. Of avoiding the effects of a fine by entry.

Avoidance of
fine by entry.

Where the operation of a fine has not been such as to work a discontinuance of the estate of a person who seeks to avoid it, he may avoid the fine by actual entry upon the land of which the fine is levied, within five years from the day on which the last proclamation was made; but if he has only a right of action, and his entry be taken away, as where the fine operates as a discontinuance of

⁴ See Plowd. 359; 2 Inst. 2 Blac. Rep. 359.

518; Co. Lit. 252, b, n. (1);

⁵ See 1 Cru. 316, 317, 330.

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the estate, there a claim or actual entry on the land will not preserve his right, or avoid the fine; because, though he has a right to the land, yet since he has not pursued it in the manner the law has prescribed, it is as ineffectual as if he had done nothing^f.

And a man that has a right of entry, may empower another to enter for him, and such entry is sufficient to avoid a fine; for what another does by command or direction is looked upon to be his own act^g. But if a another man enters in my name, and without my direction, this does not avoid the fine, or preserve any right, because the statute preserves my right, only in case I pursue it by entry, &c. in five years; but what a stranger does in my name, without my direction, is not my act, and consequently cannot avoid the fine; yet, in this case, if a stranger enters without my direction, and I agree to and approve of the entry within five years, this is sufficient to avoid the fine, because my subsequent assent and approbation is equivalent to a precedent command, and therefore the act of another by my direction is my own^h.

An entry may be made by one joint-tenant, coparcener or tenant in common, for the rest, and it will be sufficient to avoid the effect of a fine, as to the other joint-tenant, coparcener, or tenant in commonⁱ.

Also, a person entitled in remainder or reversion, or the lord of a copyholder, may enter in the name of the particular tenant or the copyholder, and such entry will preserve those particular interests as well as their own estates: so likewise the entry may be made by such particular tenants to save the rights of the remainder-men or reversioners, or the lord, on account of the privity of the estate which subsists between them: so a guardian in soccage,

^f 1 Vern. 212.

^g Moor, 450.

^h Pollard v. Lutterall,

Poph. 103; Moor, 457;

9 Co. 106, a; Cro. Eliz. 561; Co. Lit. 245; 2 Inst.

258, a.

ⁱ 1 Cra. 344.

or by nurture only, may enter in the name of his ward, and it will save his right^k.

The entry to be made to avoid a fine must be an actual entry on the land itself, and made with the express view of claiming the freehold against the fine^l; unless the party is prevented from making such entry by force, in which case a demand of the freehold, as near the land as he can safely go, is allowed, from the necessity of the case, to be effectual as an actual entry^m.

The delivery of a declaration in ejectment will not therefore amount to such an entry as will avoid a fine, even though the defendant appears to it, and confesses lease, entry and ouster; for there must be an actual entry made *animo clamandi*, whereas in an ejectment there is only a fictitious or supposed entry, for the purpose of making a demise: and the entry must be made before the time when the demise is laidⁿ.

But where the right of entry is taken away by a discontinuance, the party must make his claim by action in order to avoid the fine. The suing out of a writ, and delivering it to the sheriff, will not, however, amount to a pursuing a claim or title by way of action, unless the writ be also returned by the sheriff^o.

Avoidance by
action.

And by the 4 & 5 Anne, c. 16, it is declared, that no claim or entry, to be made of or upon any lands, shall be of any force or effect to avoid any fine levied, or to be levied, with proclamations, unless upon such entry or claim an action shall be commenced within one year next after the making such entry or claim, and prosecuted with effect.

^k See Shep. Touch. 33; 319; Vent. 42; 3 Burr. 1897; 9 Co. 106, a. Dougl. 468; *Berrington v.*

^l Skin. 412; Dougl. 484. *Parkhurst*; 2 Str. 1086; 4 Br.

^m Lit. s. 419; Co. Lit. P. C. 353, and 125. ^o *Fitzhugh's case*, 2 Leon.

ⁿ *Clerk v. Rowell* and 221. *Phillips*, Mod. 10; Saund.

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It is also to be observed, that if the claim be made by action, it must be a real action, so that an ejectment will not suffice; nor is a bill in Chancery such a claim under the statute 4 Hen. 7, as will avoid a fine². Unless in the case of a trust estate, where no entry or claim, or other legal act, by the *cestui que trust*, will be sufficient to avoid the fine, or suspend the bar arising from the non-claim, it can therefore only be done by bill in Chancery, as the claim to avoid a fine ought to be of a nature which corresponds with the estate³. And even where the subject matter of the suit is of legal jurisdiction, the filing of a bill in a court of equity will, in some instances, prevent the bar arising from a fine and non-claim: as in cases of this kind, the court will direct a trial at law, with an order that the defendants shall not set up the fine in bar of the plaintiffs claim, upon the same principle that it sometimes directs that the defendants in a suit at law shall not plead the statute of limitations⁴.

Avoidance in equity.

Lastly, a fine may be avoided, or at least its operation be annulled or controlled by a court of equity, in all cases where fraud or other malpractice has been used in obtaining it; that court does not, however, in these cases, set aside the fine, or even send the party aggrieved to the court of Common Pleas to procure a reversal, but it considers all those who are in possession of the estate under such fine to be trustees for the persons who have been defrauded, and decrees a conveyance accordingly⁵.

Within what time claim to be made.

We have said generally that entry or claim must be made within five years from the last proclamation to avoid a fine levied in pursuance of the statute of 4 Hen. 7. But it will be proper to inquire more particularly into this point,

² Comb. 249; 2 Blac. *Thornycrofte*, 1 Br. Ch. Rep. 289; 1 Cru. 366.

³ 1 Ch. Ca. 268, 278; 2 Blac. Rep. 994. ⁴ See cases cited, 1 Cru. 350.

⁵ 2 Atk. 389; *Pincke v.*

and consider the operation of the several savings in that statute relative to the same subject; as to which it is to be observed, that although the statutes of 4 Hen. 7, c. 24, and 32 Hen. 8, c. 36, have made the operation of fines stronger against parties and privies than they were at common law, (for by them the issue in tail is bound, though not those in remainder or reversion), yet have they enlarged the privilege that strangers had at common law to avoid them; for upon these statutes they have five years from the fine to make their claim, where they have a present right at the time of the fine levied; and where it accrues after the fine was levied, they have five years from the time of such accruer; whereas, by the common law, in both these cases, a stranger had only a year from the entry of the king's silver, at which time the land passed¹.

But the third section of the statute 4 Hen. 7, saves to all persons and their heirs such right, &c. as they had in the lands at the time the fine is engrossed, so that they make their claim, by way of action or entry, within five years after the proclamations shall have been completed. All persons, therefore, having a present right or title to lands, of which a fine with proclamations is levied, are allowed five years, to be accounted from the day on which the last of the three proclamations required by the statute was made, to claim their right². And although the fine be so levied as not to occasion any transmutation of possession, but the conusor continue to be in possession of the old use, yet the statute will equally bar the rights of all claimants not pursuing the titles within the period allowed by the statute³.

First saving in
4 Hen. 7.

If, therefore, tenant in tail be disseised, and the disseisor levy a fine with proclamations, the disseisee has five years allowed him, by the first saving of the statute, to make his claim, because he is the person who has the

¹ See Sugd. Vend. & Pur.
168.

² Shep. Touch. 30.
³ 2 Wils. 19.

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first right at the time of the fine being levied; but if he omit to make his claim, at that time, both himself and issue are for ever bound⁷. And though the disseisee should die before the five years be expired, the issue will not be entitled to a fresh period of five years in which to make their claim, but so much only of the five years allowed to their ancestor as was not determined at his death⁸. Because as this saving of the statute allows only one period of five years to him and his heirs, and nothing prevented his claiming in his life-time, the time began to run from the completion of the fine.

Second saving. But the fourth section (commonly called the second saving) of that act, saves to all other persons such right as shall first accrue to them after the fine levied, so that they pursue their right within five years from the time of such right accruing.

If, therefore, tenant in tail bargain and sell his lands, or discontinue the intail, and the bargainee or discontinuee levies a fine, though five years pass in the life of the tenant in tail, yet the issue shall have five years after his death to avoid the fine; for his father having relinquished all his right by the bargain and sale, could not claim any right against his own gift; the issue, therefore, in this case, comes within the second saving of the statute, because he is the first to whom the right of avoiding the fine accrued after the fine levied⁹.

But those who claim under the person to whom such right accrues, are not within this saving of the act, but are allowed so much only of the five years as have not elapsed in the life-time of their ancestor; because no person is within the second saving, but he to whom the right of avoiding the fine first accrued; and, in this case,

⁷ 3 Co. 87, b; Cro. Eliz. 896; Co. Lit. 372.

⁸ Dyer, 3; Plowd. 374; 3 Co. 87, b; *Peniston v. Lyster*, Cro. Eliz. 896.

⁹ 3 Co. 87, b; Shep. T. 30.

the right first accrued to their ancestor, and not to them^b (1).

So if tenant in tail discontinue his estate by feoffment or otherwise, reserving a rent, and dies, and the issue in tail accepts of rent from the feoffee or discontinuee, who afterwards levies a fine with proclamations, the issue in tail is precluded by the acceptance of rent from claiming the estate-tail; but upon the death of such issue in tail, his issue will have five years to avoid the fine, because he was the first person to whom the right of reversing the fine accrued^c.

So if tenant in tail (whether it be of a legal or a trust estate) levy a fine, and five years non-claim pass, and afterwards dies without issue, the persons in remainder or reversion will have five years from his death to make their claim before they will be barred; because their right did not accrue till the death of the tenant in tail without issue, which brings them within the second saving of the statute^d.

Also, if a mortgagee be disseised, and five years pass after the proclamations, the mortgagee is hereby barred; but if the mortgagor pays or renders his money, he has five years to prosecute his right by the second saving in the act, because his title did not accrue till the payment of the money^e.

Again, if a fine be levied by a husband of his lands, and five years pass without claim, the wife is not barred

^b See Plowd. 374; 3 Co. 87, b; Cro. Eliz. 896.

^d Plow. 374; T. Raym. 151.

^e Shep. Touch. 33.

^c Plow. 373.

(1) Southcote and Everson, Justices, it appears, dissented from this opinion, upon the principle, that every issue in tail should have five years to make his claim, as of a new right accrued to him *per formam doni*: but this principle was wholly disallowed by the Chief Justices Dyer and Catline. See Plow. 374.

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of her dower, but will be allowed five years from the death of her husband to make her claim, because her title to dower was not complete till her husband's decease^f (1). And if her title is prevented by any means from accruing till some time after the death of her husband, as by his being under outlawry at the time, or the like, she shall have five years after the reversal of the outlawry, or other intervening impediment to make her claim^g.

And so in all other cases, where, at the time the fine is levied, the party entitled to the land, or any interest in the land, is prevented by any legal obstacle from pursuing his claim, or his right be not then accrued, he is within the second saving of the act, and shall have five years after the accruer of the right to the removal of the obstacle. Thus, where, upon the death of a lessee, the lessor entered and levied a fine with proclamations, and five years passed before administration was granted of the lessee's effects, the administrator was held to be within the second saving of the act, and therefore entitled to the five years to pursue his right from the time the administration was granted; for till then he could not put in his claim^h.

Strangers to fines having several and distinct rights by several titles, occurring at different times, shall have several periods of five years allowed them to avoid the fine; that is to say, five years after the accruing of each title, so that if a right accrues to a stranger when a fine is levied, which he neglects to pursue within the time limited by the statute,

^f Plow. 373; 2 Co. 93, a; ^g *Menville's case*, 13 Co. *Damport v. Wright*, Dyer, 19.
224.

^h *Scandford's case*, Cro. Jac. 61.

(1) Plowden was of opinion, that, in a case of this kind, the wife was not confined to five years, but might make her claim at any time, see Plow. Com. p. 373. But the contrary is now fully established to be the law.

and another right accrues to him afterwards, he comes within the second saving of the act¹ (1).

Thus if lessee for life or years makes a feoffment and levies a fine, and five years pass without entry or claim by the reversioner, and then the lessee dies, the reversioner has five years from the death of the tenant for life to make his claim, because he has two different rights in this case upon the feoffment and fine; one immediately accrues by the act of the lessee in committing the forfeiture; the other upon the death of the lessee or expiration of the term, and therefore he shall not forfeit the last by omitting to take advantage of the first; wherefore, if the reversioner omits to enter upon the breach of the condition in law, yet his old right, which accrues upon the death of the lessee, or expiration of the term, still continuing, is saved by the statute, which preserves future rights, as well as those *in presenti*². But no person who is within the first saving of the statute can be comprehended within the second, unless the second right which accrues to him is different from the first; therefore, if tenant in tail makes a lease for life, and so discontinues the entail, and then levies a fine with proclamations, and dies without issue, and five years pass

¹ Shep. Touch. 34; 1 Cru. 219; Moor, 71; *Laund v Tucker*, Cro. Eliz. 254; 3

² *Whaley v. Tancred*, 1 Vent. Co. 78, b; Cro. Car. 157; 241; 3 Keb. 37, 110; Raym. 1 Atk. 571, S. P.

(1) But it is said by Coke, that if lessee for years be ousted, and he in reversion disseised, and the disseisor levy a fine, this, and five years non-claim, shall bar both, and the lessor shall not have another five years after the expiration of the term, because the lessee for years may have his ejectment, and the lessor his assize. But if the lessee for life be disseised, the reversioner shall have five years after the death of the particular tenant, because he can have no action to recover the freehold. 9 Co. 105, b; Co. Lit. 250; Plow. 374; *sed quare, et vide Fermor's case*, 3 Co. 77; 1 Cru. 239.

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without any entry or claim, the remainder-man is barred, and shall not have a new period of five years after the death of the lessee, because he had no other title than that which he had before; for upon the death of tenant in tail without issue his title commenced, and he shall be allowed but five years from thence to preserve it¹.

But if lands are extended on two statutes, and the person who is seised of the land levies a fine, though the conusee of the first statute must make his claim within five years after the fine has been levied, otherwise he will be for ever barred, yet the conusee of the other statute need not make his claim until satisfaction has been entered upon record on the first statute, because that is the only proper determination of an extent, so that he will have five years allowed him from that time to avoid the fine by the second saving in the statute 4 Hen. 7; because until then his right did not accrue².

And if there be tenant for life, the remainder to *B.* in tail, and the lessee levy a fine, *B.* being out of the realm; if *B.* die beyond sea, the issue in tail is at large to avoid the fine when he pleases, for that clause of the 4 Hen. 7, c. 24, which gives persons out of the realm, infants, &c. and their heirs, five years after their impediments removed, to pursue their right, cannot be extended to this case, because *B.* being dead, cannot return into the realm to make his claim, and the clause limits five years to him and his heirs after his return, which is now become impossible³.

The statute 4 Hen. 7, we have seen, does not extend to the possessions of the church; but yet in case a bishop, dean, vicar or prebendary, should neglect to make his claim within five years after a fine levied of an estate to which he was entitled in right of his bishoprick, &c. he will be barred during his life, but his successor will be

¹ *Salvin v. Clerk*, Cro. Skin. 260; S. C. Lords Car. 156; *W. Jones*, 211. Journals, vol. 16, p. 454;

² *Deighton v. Grenville*, Cruise on Fines, 242.
³ 2 Ventr. 333; 1 Show. 36; ^a 2 Inst. 519.

allowed five years to avoid the fine, from the time of his becoming entitled to the lands^o.

And in like manner, a fine will bar all persons having life interests in offices annexed to lands, unless they make their claim within five years after the fine was levied, but each officer will be allowed that period to avoid the fine from the time he became entitled. Thus, where a copyholder of a dean and chapter levied a fine with proclamations, and five years passed without any claim by him who was dean at the time of the fine, yet the succeeding dean was not bound by the fine, because if that were allowed, the statutes of 1 Eliz. c. 19, and 13 Eliz. c. 10, would be of little use to restrain alienations; for by combination between the dean and tenant, all lands belonging to the chapter might be aliened, and their successors barred by fine and non-claim^r.

There is still a further clause in the nature of a saving Third saving.^c in the stat. 4 Hen. 7, which in conformity to the common law, and the statute *de modo levandi fines*^q, provides^r, that if the person to whom any such right, as is alluded to in the preceding savings of the act, shall accrue, be at the time "covert de baron, within age, in prison, out of this land, or not of whole mind," then such right shall be saved to them till such disability be removed, so that they or their heirs may pursue their said rights by action or entry (according to the nature of their title) within five years thereafter; but^s unless they pursue their said rights within the time aforesaid, they shall be for ever barred (1).

^o Plow. 538.

^q See Brac. l. 5, c. 29, s. 3;

^r Mag. Col. case, 11 Co. Flet. l. 6, c. 54; 2 Inst. 516.

78, b; *Howlett v. Carpenter*, ^s Sec. 5.

1 Vent. 311; 3 Keb. 773; 1 ^c Sec. 6.

Cru. 288.

(1) And by 4 Anne, c. 16, they are required to try the right within one year after they make their claim.

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Coverture.

If, therefore, a husband levy a fine of his wife's inheritance, she shall have five years after the termination of her coverture to make her entry; but if she let five years pass after his death, she will be barred of her right, notwithstanding the stat. 32 Hen. 8 (1).

And although the party, being a stranger to the fine, have right at the time of the fine levied, which he neglects to pursue in due time, yet if any subsequent right accrue to him, he will, as we have seen, as to such subsequent right, be included in the second saving of the statute, and have a further term of five years after the accruing of such right; for it is a maxim in law, that *quando duo jura in una persona concurrunt aequum est ac si essent in diversis*¹.

Infancy.

And if an infant disseisor disseise, or make a feoffment, and the feoffee or disseisor levy a fine, and five years pass, the first disseisee is barred of his right by the first saving of the act, because he has a present right, which he ought to pursue immediately by action or entry; but the infant shall have five years from his full age to avoid the fine, because no laches are to be imputed to him but from the time he arrives at his full age.

But the privileges of infancy, coverture, and the like, it is material to observe, belongs to them only when they are the first persons to whom the right of avoiding the fine accrues, and not when such right accrues to them on the death, &c. of one in whom it had previously vested; for in this respect, persons under these disabilities stand in the same situation as those whom we have before observed to be within the second saving of the statute. If, therefore, the person to whom such right first accrued die before the

¹ See Shep. Touch. 34; 1 Cru. 237.

(1) By stat. 32 Hen. 8, c. 28, a fine levied by a husband of his wife's land, shall not work a discontinuance; but this statute does not invalidate fines duly levied of her land. See 8 Co. 72, b; 1 Cro. 234.

expiration of the five years, and without having made his claim, and the right, upon his death, descends to his heir or other person, who is under any of the disabilities mentioned in the act, such son, &c. will not have five years after the death of his ancestor, but must make his claim within five years from the time the right of avoidance accrued to him who was not under disability at the time. Thus, where *A.* seised of Blackacre in fee, was disseised by *B.* who levied a fine with proclamations of the said Acre during the life of *A.* Three years after the fine levied, *A.* died, and his right descended to *C.* his grandson, as his heir, who, at the time of the descent of such right, was an infant; and the question was, whether *C.*, having suffered five years, after the fine levied, to pass, during his ancestor's life and his minority, without making any claim, should be barred, or should have other five years, upon his arrival at full age, to make his claim in; and it was adjudged that he should not, but that he was barred, and that by virtue of the first saving in the 4 Hen. 7, c. 24, which saves to every person and their heirs, other than parties to the fine, such right, claim and interest as they have in lands and tenements whereof a fine is levied, so that they pursue such right by way of action or lawful entry within five years". Now *A.* having a right to Blackacre at the time the fine was levied, consequently he and his heirs must be comprehended in this saving; but then they cannot take the benefit of such comprehension unless they pursue the method, and the time prescribed and limited in the said saving, which they apparently neglected to do, since neither *A.* nor his grandson made any claim or entry, or brought any action for recovery of their right, within the five years, and therefore such right must be barred and extinguished; and *C.* in this case, shall have no privilege of infancy, because the statute intends that only in

* *Stowel v. Zouch*, Plow. Ca. 74; 1 Cru. 255; see 356 to 372; Jenk. Cent. 6, also Co. Lit. 247, a, n. (2).

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cases where the right first attached in the infant, and therefore shall have five years after his infancy to make his claim; but here the right was first in *A.* at the time of the fine, and the statute allows but five years to pursue the right from the time it accrues, which was not done in this case.

But if *A.* be tenant in tail, the remainder to *B.* in fee, and *A.* levies a fine with proclamations, and then *B.* dies, his heir being within age, and then *A.* dies without issue, and five years pass without any action brought by the heir, yet he shall recover the land, notwithstanding the five years lapsed, either during his minority (because the right first accrued to him, *B.* having no right to the land by the remainder till the estate-tail was spent, which did not happen in his life), or he may defer making his claim till he comes of age, and then, by the express words of the act, he shall have five years to recover his right².

And if an infant be in his mother's womb when a fine is levied, he will be allowed five years from the time he attains his full age, to make his claim; for, although he is not comprehended within the letter of the act, which only mentions infants under the age of twenty-one years, and therefore does not extend to those who are unborn, yet they are within the intention of the act, and will be aided by the exception⁷.

If a person labours under several disabilities at the same time, as, if a woman is covert, under age, of insane mind, and in prison, at the time when the fine is levied; or when a right accrues to her, and one or more of those disabilities are removed, still the five years given by the statute will not commence until all her disabilities are entirely removed².

But it is now settled, notwithstanding some old opinions to the contrary³, that when once the five years, allowed to persons labouring under disabilities to avoid a fine,

² Dyer, 133.

⁷ Plowd. 366.

² Idem. 375; 1 Leon. 215;

² Atk. 614.

³ See Plowd. 366.

begin, the time continues to run, notwithstanding any subsequent disability^b. FINES.

But as the time does not begin to run till the third proclamation has been made, it seems, that though the person be not under the disability at the time the fine was levied, yet if he become so before the last proclamation, he shall not be bound to claim within five years from the last proclamation, but shall have till that period after his disability be removed^c.

If, however, the disability of a person, under the impediments mentioned in the act, be once wholly removed, so that the time once begin to run, the term will proceed, though he immediately after fall into the same predicament, and continue so for the remainder of the five years, and he shall be as much precluded, and his heir, if he die, as if he had been free from the impediment the whole of the five years^d.

But if a person to whom a right accrues to lands of which a fine has been levied, labours under any of the disabilities specified and excepted in the statute 4 Hen. 7, and dies before his disabilities are removed, it seems to be a doubtful point whether the heir of such person be obliged to make his claim within five years after the death of his ancestor, or be allowed an indefinite time for the purpose^e. The better opinion, however, should seem to be, that such heir is not confined to make his claim within the period, but may enter at any indefinite period afterwards^f.

^b *Doe v. Jones*, 4 Term. Rep. 301.

^c See Plow. 366.

^d *Ibid.* 375.

^e See Cru. on Fines, 258, &c.

^f See 2 Inst. 519; Cro.

Eliz. 219; 1 Leon. 211;

Sav. 128; 1 Cru. 258; 1 Ca.

Op. 423; *Dillon v. Lemon*,

2 H. Blac. 584; and Sugd. Vend. & Pur. 168.

CHAP. II.

OF COMMON RECOVERIES.

RECOVERIES.

IN treating of common recoveries we may consider,

- I. THE NATURE AND ORIGIN OF COMMON RECOVERIES.
- II. WHAT PERSONS MAY SUFFER RECOVERIES.
- III. OF WHAT THINGS A RECOVERY MAY BE SUFFERED, AND BY WHAT DESCRIPTION.
- IV. IN WHAT COURT RECOVERIES MAY BE SUFFERED, AND OF THE MANNER IN WHICH THEY ARE TO BE SUFFERED.
- V. THE EFFECT AND OPERATION OF A RECOVERY.

I. OF THE NATURE AND ORIGIN OF COMMON RECOVERIES.

Definition of a common recovery,

A COMMON recovery, in its ancient and more extensive sense, may be defined to be a restitution, by the judgment of a court of record, of a former right, of which the recoveror has been defeated^a; but in its modern and more usual sense it is a "certain form or course allowed by law to be observed for the better assurance of lands, and generally used for the barring estates-tail, remainders and reversions^b;" or, more accurately, a judgment obtained in a fictitious suit, in which lands are recovered against the tenant of the freehold, in consequence of a default made

^a See nature, &c. of common recoveries stated and explained, *Master d. Tregonwell v. Strachan*, 5 Durnf. & East, 107, n.

^b Pig. Recov. 1.

by the person last vouched to warranty in such suit; which recovery being a supposed adjudication of the right, binds all persons, and vests a free and absolute fee-simple in the recoveror; for judgments, whether obtained after a real defence made by tenant to the writ, or pronounced upon his default or feint plea only; had, at the common law, the same efficacy to bind the land in question^d.

The origin of common recoveries (1), and the occasion of introducing them, has been much controverted; some are of opinion that the origin of common recoveries is to be dated from the time of Edward 4, who, observing the great effusion of blood occasioned by the unhappy disputes between the houses of York and Lancaster, and finding that though he used the extremity of law against the opposite party, by attainting them of high treason, yet their estates being protected in the sanctuary of entails, this had little effect on their families; and the son who succeeded the father generally inherited his principles and party, as well as estate: to remedy this inconvenience, and to give people an opportunity to dock their estates, suffered or instigated *Taltarum's* case to be brought before the court in the twelfth year of his reign, as King James 1 did *Calvin's* case, and King James 2, *Edward Hale's* case, where the judicial decision was made auxiliary to his policy, by declaring in effect, that a common recovery, suffered by a tenant in tail, should be an effectual destruction of the entail; for, though *primâ facie*, *Taltarum's* case seems to be an adverse judgment, and the court held that estate-tail not to be barred, because, as that case was cir-

The origin of common recoveries.

* Bac. L. Tr. 148.

^d 2 Inst. 75, 429.

(1) See Pig. Recov. 8; Cru. Recov. c. 1; Shep. Touch. 37; Doct. and Stud. Dial. 1, c. 26; *Sayer ex dem. Atkins v. Horde*, 1 Burr. 115.

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cumstanced (1), tenant in tail was seised of another estate, and the recovery in value, which is the reason of barring the issue, goes according to the estate whereof the tenant was seised at the time of the recovery, and not in recompense of the estate he had not; so that here tenant in tail being in of a special estate-tail, the first estate-tail was not barred. Yet, by what was said by the bench in this case, it appeared that the judges were of opinion, that if in this case the tenant in tail had come in as a vouchee, he had then come in of all the estates he ever had, though discontinued and turned to a right; and therefore been barred; whence, from this case, most writers date the era of common recoveries. Others, however, think they are of far greater antiquity, and apparently with reason; for it is clear that when the judges saw the ill consequences these fettered estates introduced, and that they tended towards a perpetuity, they greatly discountenanced them, and endeavoured to lessen their authority. And my Lord Coke, in *Mary Portington's case*^c, cites several cases, in the reign of Edward 3, in which the judges were of opinion, that a common recovery was a good bar to an estate-tail. Whence Mr. Pigot infers, that common recoveries originated from the case of *Octavian Lombard*, who, in the 43d year of Edward 3^f, brought a replevin for taking his cattle: the defendant avows, for that one Nicholas was seised in tail, and had issue John and Joan: Nicholas dies; John being then beyond sea, Joan the daughter enters, and has issue Nicholas, who enters: John the son returns from beyond sea, and sues for the land, and on an agreement releases to Nicholas, and for this release

^c 10 R. 37, 6.

^f Yr. Bks. 21.

(1) In *Taltarum's case*, tenant in tail general made a feoffment in fee, and took back an estate to him and his wife, and the heirs of their bodies: the wife died; a *præcipe* was brought against the tenant in tail, who vouched the common vouchee. Year Books, 12 Edw. 4. 14; 19.

Nicholas grants him twenty pounds a year, with a clause of distress, and for rent arrear avows on the land charged, then in the hands of the issue of Nicholas, and the distress is held good. Now the gist of this case is, tenant in tail *pro lite redimenda*, grants to one, that had a prior right to the estate, a rent-charge, in consideration of a release of his right; and this being for the benefit of the issue, it was held that he could not avoid it: from this ground, therefore, he concludes common recoveries had their origin; for the issue in all common recoveries is supposed to have a recompense in value for the estate lost, and this recompense in value is generally deemed the reason of his being barred^{*}; and although it may be objected that this is all supposition, since it is notorious that, in reality, the issue on a common recovery has no recompense, and this is all a fiction of law, which has occasioned much censure to be cast on these recoveries (1); yet it may be observed, that in *fictione jure subsistit equitas*; and all laws have their fictions, and all grounded on reason; and the public having now experienced the beneficial effects of them, and they being become common assurances, the judges are even *astuti* in supporting them, and inventing reasons to maintain their authority. But though, for several centuries, the sole reason given for common recoveries was the recompense in value the issue had, or by possibility might have, yet it could not but have been perceived, in process of time,

^{*} T. 7 Edw. 4, 19, pl. 25.

(1) See Sir Thomas Craigg's *De Feodis*, 161, who says, "Et licet ex jure Anglorum provideri in feodo talliato posit, ne in fraudem hæredum qui in tallio succedere deberet, alienatio fiat qui tamen in foro versantur, callidis artibus mentem legis subvertunt, et ex illicito licitum per ambages faciunt, dum quod vassallus alienare non potest, propter conditionem in feodo talliato expressam, id ei colludenti sive consentienti, simulatus contradictor (revera autem feodi) ex tacito consensu judicio feodum evincit, illi recuperationem vocant."

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that there were many cases in which the issue or party barred could have no possibility of recompense; as if there be tenant in tail, remainder for years, and tenant in tail suffers a recovery, the remainder is barred, but no recompense in value can extend to a term, which is but a chattel. So if a feme covert and her husband are vouched, she is barred, though the recompense extends not to her: so contingent estates are barred without a recompense. Hence, the judges have said, that the reason of the reversion or remainder being barred by a recovery is, that the recoveror is, by supposition of the law, in of the estate-tail, and that estate-tail, by like supposition of law, continues for ever: and at common law, the *donee post prolem suscitatem* might have aliened and have barred the donor. These common recoveries were therefore conveyances excepted out of the statute *de donis*, and a privilege inherent and annexed to the estate-tail, and not taken away by that statute: and the recoveror being in of the estate the donee had, and the estate-tail continuing in judgment of law, he in remainder is so barred, that no charge by him can ever take place^a.

Another objection has also been made against common recoveries; namely, that when a tenant is said to appear, and vouches to warranty, it is notorious there was never any warranty between the parties; it being all a fiction and invention to bar the entail: but to this it may be answered, that whenever tenant in tail is vouched, he comes in of the same possession he had before, and to warrant this possession; for, when a man is vouched to warrant, and enters into warranty, the law presumes he has parted with the first possession with warranty, and comes now to warrant it pursuant to such warranty; and that if it were otherwise, he would not enter into the warranty, but counter-plead it, and demand the lien or ground on which the tenant founds his warranty; but if, without demanding the lien, he enters into warranty, none can say he never

^a Fig. 13.

warranted; the tenant cannot say the vouchee never gave him a warranty, because the vouchee has entered into warranty; and the vouchee cannot say he never warranted, because his entering into warranty is an estoppel by record, which binds him and his heirs; so none privy to the record can deny it; nor can any stranger, because the law will always presume, when any one enters into warranty, that there was a warranty by feoffment or grant of such an estate as he who is vouched had before; and this is *presumptio juris*, and grounded on reason; for being to the vouchee's prejudice, and he binding himself to render the value of the land in demand, the law will not presume that he would thus prejudice himself unless he had actually warranted¹.

A common recovery is so far like a fine, that it is a suit or action, either actual or fictitious; and in it the lands are *recovered* against the tenant of the freehold; which recovery being a supposed adjudication of the right, binds all persons, and vests a free and absolute fee-simple in the recoveror (1). A recovery, therefore, being in the nature of an action at law, not immediately compromised like a fine, but carried on through every regular stage of proceeding, there would be great reason to apprehend that its form and method would not be easily understood by the student, who may not yet be acquainted with the course of judicial proceedings, had not its nature and progress been stated with the utmost clearness and concision by Sir William Blackstone.

The nature and use of common recoveries.

¹ Pig. 16.

(1) There is this difference, amongst others, between a recovery and a fine, that a fine proves a right in him that levies it, but a common recovery disapproves and disaffirms all title of him against whom it is had, (Popham, 23.) and this so strongly, that if there be three or four descents cast after the recovery suffered, the recoveror may enter. 6 Edw. 4, 11.

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Let us, in the first place, he observes, suppose *David Edwards to be tenant of the freehold*, and desirous to suffer a common recovery in order to bar all entails, remainders and reversions, and to convey the same in fee-simple to *Francis Golding*. To effect this, Golding is to bring an action against him for the lands; and he accordingly sues out a writ, called *præcipe quod reddat*, because those were its initial or most operative words, when the law proceedings were in Latin. In this writ, the demandant Golding alleges, that the defendant Edwards (here called the tenant) has no legal title to the land; but that he came into possession of it after one *Hugh Hunt* had turned the demandant out of it. The subsequent proceedings are made up into a record or recovery roll, in which the writ and complaint of the demandant are first recited: whereupon the tenant appears, and calls upon one *Jacob Morland who is supposed* at the original purchase to have warranted the title to the tenant; and thereupon he prays that the said *Jacob Morland* may be called in to defend the title which he so warranted. This is called the *voucher, vocatio*, or calling of *Jacob Morland* to warranty; and *Morland* is called the *vouchee*. Upon this, *Jacob Morland*, the vouchee, appears, is impleaded, and defends the title. Whereupon *Golding*, the demandant, desires leave of the court to *impart*, or confer with the vouchee in private; which is (as usual) allowed him. And soon afterwards, the demandant, *Golding*, returns to court, but *Morland*, the vouchee, disappears, or makes default. Whereupon judgment is given for the demandant *Golding*, now called the recoveror, to recover the lands in question against the tenant *Edwards*, who is now the recoveree: and *Edwards* has judgment to recover of *Jacob Morland* lands of equal value, in recompense for the lands so warranted by him, and now lost by his default; which is agreeable to the doctrine of warranty already mentioned. This is called the recompense, or

recovery in value. But Jacob Morland having no lands of his own, being usually the cryer of the court, (who, from being frequently thus vouched, is called the *common vouchee*,) it is plain that Edwards has only a nominal recompense for the lands so recovered against him by Golding, which lands are now absolutely vested in the said recoveror by judgment of law, and seisin thereof is delivered by the sheriff of the county. So that this collusive recovery operates merely in the nature of a conveyance, in fee-simple, from Edwards, the tenant in tail, to Golding the purchaser¹.

By this means, the estate-tail, which was made by the tenant or his ancestors, is barred; for he could have no power to entail land to which, as now appears by the recovery, he has no just title, the land being evicted and recovered from him².

But the recovery, here described, is with a single voucher only; it is sometimes, however, with double, treble, or farther voucher, as the exigency of the case may require. And, indeed, it is now usual always to have a recovery with double voucher at the least: by first conveying an estate of freehold to any indifferent person, against whom the *præcipe* is brought; and then he vouches the tenant in tail, who vouches over the common vouchee. For if a recovery be had immediately against tenant in tail, it bars only such estate in the premises of which he is then actually seised; whereas, if the recovery be had against another person, and the tenant in tail be vouched, it bars every latent right and interest which he may have in the lands recovered³. If Edwards, therefore, be tenant of the freehold in possession, and John Barker be tenant in tail in remainder, here Edwards doth first vouch Barker, and then Barker vouches Jacob Morland, the common vouchee; who is always the last person vouched, and always makes default: whereby the demandant Golding recovers the

¹ 2 Blac. Com. 358.

² Pig. 17.

³ Bro. Abr. tit. Tail, 32; Plowd. 8.

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land against the tenant Edwards, and Edwards recovers a recompense of equal value against Barker the first vouchee, who recovers the like against Morland, the common vouchee, against whom such ideal recovery in value is always ultimately awarded^o. And this supposed recompense in value is, as has before been noticed, the reason why the issue in tail is held to be barred by a common recovery. For if the recoveree should obtain a recompense in lands from the common vouchee (which there is a possibility in contemplation of law, though a very improbable one, of his doing,) these lands would supply the place of those so recovered from him by collusion, and would descend to the issue in tail^p. This reason will also hold with equal force, as to most remainder-men and reversioners; to whom the same possibility will remain and revert as a full recompense for the reality, which they were otherwise entitled to; but it will not always hold; and therefore, as Pigot says^q, the judges have been even *astuti* in inventing other reasons to maintain the authority of recoveries. And in particular, it hath been said, that, though the estate-tail is gone from the recoveree, yet it is not destroyed, but only transferred; still subsists, and will ever continue to subsist (by construction of law) in the recoveror, his heirs and assigns: and, as the estate-tail so continues to subsist for ever, the remainders or reversions expectant on the determination of such estate-tail can never take place^r.

To such awkward shifts, such subtle refinements, observes Sir W. Blackstone, and such strange reasoning, were our ancestors obliged to have recourse, in order to get the better of that stubborn statute *de donis*. Our modern courts of justice have, however, adopted a more manly way of treating the subject; by considering common recoveries in no other light, than as the formal mode

^o Bro. Abr. tit. Tail, 32; Plowd. 8.

^q Com. Recov. 13, 14.

^r 2 Blac. Com. 369

^p Dr. & St. b. 1, Dial. 62.

of conveyance, by which tenant in tail is enabled¹ to alien his lands².

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II. WHO MAY SUFFER A COMMON RECOVERY.

A RECOVERY being now considered as a common assurance for the conveyance of lands from one person to another, it may be taken as a general rule, that all persons who are capable of executing a common law assurance *in pais*, are also capable of suffering a recovery to bar or pass the particular estate or interest which they may have in the lands comprised in the writ. But as many persons are disabled by physical or civil incapacities to convey their possessions by act *in pais*, so are they by common recovery. Thus, when recoveries were improved into a common way of conveyance, it was thought reasonable that those whom the law had judged incapable to act for their own interest, should not be bound by the judgment given in recoveries, though it was the solemn act of the court; for where the defendant gives way to the judgment, it is as much his voluntary act and conveyance, as if he had transferred the land by livery, or any other act *in pais*; and therefore if an infant suffers a recovery, he may reverse it, as he may a fine, by writ of error during his minority³. And this was formerly taken to be the law, as well where the infant appeared in person, as by guardian or by attorney; but now there is a distinction where he suffers a recovery in person, and where not. If in person, it is erroneous, and he may reverse it by writ of error during his minority, that his infancy may be tried by the inspection of the court, for at his full age it becomes obligatory and

¹ 2 Com. 358.

² Saund. 94; Cro. Eliz. 471;

³ Buls. 235; 2 Rol. Abr.

Hob. 196; Cro. Car. 307,

395; Co. Lit. 381, b; 10 Co.

923; 5 Mod. 200; Pig. 64;

43; 2 Rol. Abr. 731, 742;

Cru. 182.

Sid. 321, 322; Lev. 142;

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unavoidable' (1): but, in some instances, the court has admitted the infant to appear by guardian, and to suffer a recovery, or come in as vouchee; but this is seldom allowed, and only upon emergencies, when it tends to the improvement of the infant's affairs, or when lands of equal value have been settled on him. Hence it was formerly the practice, when an infant was intended to suffer a recovery, for him and his guardian to petition the king to grant letters under the privy seal to the court of Common Pleas, directing them to permit such infant to suffer a recovery; which has some resemblance with the civil law, where the imperial authority supplies the defect of legal age. Upon producing this privy seal to the court, they admitted a person of known ability and integrity to be guardian, and on showing the reasons for suffering a common recovery, and proving that it is for the infant's advantage, it was done in open court. And in this case the judges used to examine very strictly into the present entails, (and take the consent of those in remainder) and into the ends and purposes of such recovery, and to be attended with the writings and parties in court or at their chambers, before they admitted a guardian, and suffered the recovery to be passed in court*. But it was still in the discretion of the judges to permit the infant to suffer a recovery or not, according to the circumstances of the case² (2).

* See *Blunt's case*, Hob. Pig. Recov. 3d edit. 64, n. 7; 196; Jenk. Cent. 299; 1 Cru. 181.
 Vern. 461; Cro. Car. 307; ² 1 Ld. Ra. 113; 2 Salk. 567.

(1) See observations on the hardship of infants not being suffered to reverse fines or recoveries after their majority, Co. Lit. 247, a, n. (2).

(2) Common recoveries suffered by privy seal are now, however, disused, and private acts of parliament universally substituted in their stead. Cruise on Recov. 184.
 For

But if an infant suffers a recovery, and appears by attorney it, seems he may reverse it after his full age; for here it may be discovered, whether he was within age when the recovery was suffered, because it may be tried *per pais*, whether the warrant of attorney was made by him when he was an infant¹. When, therefore, an infant is to suffer a recovery, he must make a tenant to the *precept* by fine, or by feoffment, and give livery of seisin in person, by which means the feoffment is only voidable; whereas, if an infant appointed an attorney to give livery of seisin for him, the feoffment would be absolutely void².

An infant trustee may join in a common recovery, in consequence of the statute 7 Anne, c. 19, if he is directed to do so by the Court of Chancery³, for the act is general "that the infant shall convey as the court by order shall direct:" they may therefore direct a conveyance by fine or recovery, where such mode is requisite.

Idiots, lunatics, and generally all persons of non-sane memory, are disabled from suffering common recoveries, as well as from levying fines; though if an idiot or lunatic does suffer a common recovery, and appears in person, no averment can afterwards be made that he was an idiot or lunatic. But if he appears by attorney, it seems that such an averment would be admitted, upon the same principle that an averment of infancy may be made against a warrant of attorney, acknowledged by an infant for the purpose of suffering a common recovery, as the fact of idiocy may be tried by a jury, with as much propriety as the fact of infancy⁴. Thus in the celebrated case of *Hume v. Burton*,

¹ Sid. 321; Lev. 142, Q.² Cruise on Recov. 185;³ Perk. 12; 3 Barr. 1804. ⁴ 2 And. 163; Pig. 72.⁵ *Ex parte Johnson*, 3 Atk.

For notwithstanding the precautions of the judges, recoveries suffered in that manner might be reversed by writ of error. Cro. Car. 307; 1 Mod. 48; Pig. 66; Cru. 184.

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which was determined by the House of Lords in Ireland, the majority of the judges were of opinion, that the caption of a warrant of attorney, taken by the Chief Justice of the court of Common Pleas, for the purpose of suffering a common recovery, was not conclusive evidence of the capacity of the person acknowledging such a warrant of attorney^c.

But although no averment of idiocy or lunacy can be made against a recovery, where the parties appear in person, yet evidence of weakness of understanding has been admitted to invalidate a deed to make a tenant to the *præcipe* for suffering a recovery; and the recovery has in that manner been set aside^d.

Feme covert.

A recovery may be suffered as well as a fine levied by a feme covert; because the *præcipe* in the recovery answers the writ of covenant in the fine to bring her into court, where the examination of the judges destroys the presumption of law that it is done by the coercion of her husband, for then it is presumed they would have refused her^e (1); for whenever a husband and wife appear in court to suffer a common recovery, the wife is previously examined as to the freedom of her consent: and where a warrant of attorney is acknowledged before commissioners under a *dedimus potestatem* by husband and wife, the commissioners are expressly directed to examine the wife separately and apart from her husband, as to the same intent^f.

^c *Hume v. Burton*, Cru. Recov. 361.

^e 10 Co. 43, a; 2 Rol. Abr. 395; see Pig. 66.

^d *Wentworth's case*, 2 Ves. 403; 3 Atk. 313; *Jones v. Cave*, Cru. Recov. 355.

^f 1 Hen. Blac. 527.

(1) The first mention of an examination of the wife on a recovery is in 43 Ed. 3, c. 18, and it was afterwards, it should seem, disused. See Pig. Rec. 66. But the practice now is for the serjeants at the bar to examine *femes covert* when they come to suffer recoveries; Cru. 179.

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And a common recovery suffered by husband and wife, will therefore bar the wife of her dower, though she has no recompense². For though this has by some been doubted, because the woman has then no estate *in esse*; yet the same may be said against a fine; and the common recovery estops her as party, and the recovery disaffirms her husband's title to the lands of which she was dowable³.

And it may be observed, that the husband, whether seised jointly with his wife, whether by moieties or entireties, or seised only in right of his wife, may create an estate of freehold during the coverture, and thereby make a good tenant to the *præcipe*, without his wife's joining; and this now is in constant experience and practice, and saves the charge of a fine.

Attainder is a legal disability; and therefore if tenant in tail be attaint, and office found, and land be granted to *A.* who sells it to *B.* who suffers a common recovery, and vouches tenant in tail, the remainders are not barred⁴. But yet according to some there should seem to be such a *scintilla juris* in the tenant in tail, after an attainder, that if there be a good tenant to the *præcipe*, he may by common recovery bar the issue, reversions and remainders; for if the king pardon the party, and restore the land, though the attainder is in force, he may bar the entail⁵.

Persons attainted.

Alienage is also another legal disability; but if an alien be tenant in tail, this is a good estate-tail till issue, though not descendible to his issue⁶. But if lands are given to an alien in tail, remainder to *C.* in fee, and the alien suffers a common recovery, and afterwards an office is found, this recovery will bar *C.* and the king will have a good fee;

Alien.

² 2 Co. 74, 78; 10 Ibid. ¹ Keb. 30, *contra arguendo*; 43; Plowd. 504, 514. ² Pig. 73; 1 Keb. 30, 398.

³ Pig. 67.

⁴ 9 Co. 141.

⁵ Godb. 218; but Allen in

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for till office the alien was seised, and there was a good tenant to the *præcipe*^m.

Besides the natural and legal disabilities before-mentioned, the king is disabled from suffering a common recovery by reason of his great dignity, for if he suffer a common recovery, he must be tenant or vouchee; and in both cases the demandant must count against him, and there must be judgment against him, which the law does not permitⁿ.

Women seised
jure mariti.

Other persons are disabled by act of parliament, as wives seised of estates of their husbands. For by the 11 Hen. 7, c. 20, it is enacted, that if any woman who shall have any estate in dower, for life or in tail jointly with her husband, or only to herself or to her use, of any manors &c. of the purchase or inheritance of her husband, or given to the husband and wife in tail or for life, by any ancestors of the husband, or any other person or persons seised to the use of the husband, or of his ancestors, shall, being sole, or with any after-taken husband, discontinue, alien, release or confirm with warranty, or by covin suffer a recovery of any such manors, such recovery shall be void (1), and it shall be lawful for the person or persons next in remainder or reversion to enter, except where the recovery be had with the assent of the next heir, remainder-man or reversioner, and such assent is of record or enrolled.

Hence, this act being liberally construed, so as to prevent the mischief it was intended to remedy; whosoever, therefore, an estate has been derived either from the husband

^m Godb. 102; Noy, 137;
4 Leon. 84.

ⁿ See Cro. Car. 96, 97;
Plow. 244.

(1) And see this act confirmed by 32 Hen. 8, c. 36, by s. 2 of which statute it is enacted, that no fine levied by any woman of any such estate as is mentioned in 11 Hen. 7, c. 20, shall be of any effect.

himself or from any of his ancestors, it is protected by the statute, and the entail preserved for the inheritable issue^o.

And trust or equitable estates are equally within the statute as legal estates, for the statute expressly mentions uses, and a trust now is what an use then was^p.

But to bring the same within the compass of this act, the provision must come purely from the baron or some of his ancestors; for the object of the statute was to prevent women from alienating from the heir lands which might be settled on them by their husbands, and did not intend to meddle with lands which were originally the property of the wife herself, or of any of her ancestors^q.

Where, therefore, a man made a gift to his man servant and wife in special tail, this was held clearly not to be a jointure within the statute, because the land did not come from the husband or any of his ancestors; and a fine levied of them by the wife after her husband's death was held good^r.

And as the reason of the act was to prevent the issue or inheritable heirs of the husband from being disinherited of the estate of their father, contrary to his intention, the act does not extend to lands limited by the husband or his ancestors to the wife in tail general, without any limitation to the issue or heirs of the husband; for since there is no limitation to such issue or heirs, no prejudice is done to them by her alienation. Where, therefore, a man seised in fee of lands, devised them to his wife in tail general, remainder over to a stranger: the husband died, leaving issue, and the wife married again, and suffered a recovery to bar the entail; the recovery was held good,

^o Mod. 93, pl. 231; 3 Co. 50, b; Cro. Eliz. 513; 4 Reeve. E. L. 140; Cru. 188.
^p 2 Vern. 489; 1 Eq. Cas. Abr. 220.
^q Cro. Car. 244; 1 Inst. 366; Plowd. 464.
^r Ward v. Walthew, Cro. Jac. 173; 1 Brownl. 137; Yelv. 101; and see Co. Lit. 366, a.

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because, though his case was within the letter of the act, it was not within the meaning; for the remainder being limited from the heirs of the husband, they could not be prejudiced^a. And *à fortiori*, when the estate is limited to the wife in fee, it is not within the statute^b.

Nor does the statute extend to lands holden by copyhold tenure; for as the freehold of such lands is in the lord, it cannot be discontinued by any act of the tenant; and besides, as an entry is given to the heir by the statute for the forfeiture, if the act extended to copyholds, he would become tenant by force of the act, without admittance, which would be prejudicial to the rights of the lord^c.

The act of 11 Hen. 7, we perceive, was made wholly in favour of the husband; but by 32 Hen. 8, c. 28, a similar provision is made in favour of the wife; for by this statute it is enacted^d, that no fine, feoffment, &c. by the husband alone of any manor, &c. the inheritance or freehold of the wife, during the coverture between them, shall work a discontinuance, or be anywise hurtful to the wife or her heirs, who may, notwithstanding, enter thereon as if no such fine, &c. had been levied; fines, &c. levied by the husband and wife, to which the wife is party and privy, only excepted. Before which statute, if a husband, who was seized of lands in right of his wife, had levied a fine, or suffered a recovery of them without her concurrence, she was barred of her entry, after his death, and put to her writ of *cui in vita*^e.

This act, like the former, is also liberally construed, being made to suppress a wrong, and give the party injured a more speedy remedy than she had by the common

^a *Footer v. Pitfal*, Cro. Eliz. 2, 524; 1 Leon. 261; *rington v. Smith*, 2 Sid. 41, 73; 4 Mod. 45.

Hughes v. Clubb, Com. Rep. 369.

^b 4 Co. 3, b.

^c Gilb. Ten. 181; *Har-*

^d Sect. 6.

^e Lit. s. 594, 731; Co. Lit. 326, a.

law. Where, therefore, lands were given to husband and wife in special tail, and the husband alone levied a fine of them and died, and the wife entered, her entry was holden to be lawful, though the lands, in this case, were the inheritance of the husband as well as of the wife, and the words of the statute are confined to lands, "being the inheritance or freehold of the wife".

And it will be the same if made by *feoffment* by the husband and wife both, although the words of the statute are, "by the husband only;" for this being an act *in pais*, in which the assent of the wife is nugatory, it is to be taken as the act of the husband alone^a.

And where husband and wife were joint purchasers in tail, with remainder to the wife in fee, and the husband alone levied a fine and died, this was held to be within the statute^b (1).

And if in these cases the wife die before entry, her issue, or those in remainder or reversion, may enter^c.

This statute does not, however, extend to copyholds, for the reason before given^d.

The next statute that disables particular persons from suffering common recoveries, is 14 Eliz. c. 8, which declares, that all recoveries had or prosecuted by agreement of parties, or by covin, against tenant by the curtesy, tenants in tail after possibility of issue extinct, for term of life or lives, or estates determinable on life or lives of any lands, tenements and hereditaments, whereof such par-

Tenants for life.

^a *Greenley's case*, 8 Co. 71; and see Co. Lit. 326, a; 2 Inst. 681.

^a Co. Lit. 326, a.

^b *Dyer*, 162, pl. 48.

^c Co. Lit. 326, a.

^d *Beaumont's case*, 1 Inst. 681.

(1) And although the husband and wife, after the husband's alienation, be divorced *causa præcontractus*, this will not take away her entry; for it is sufficient that she was his wife *de facto* at the time of the alienation, to entitle her to the benefit of the statute. Co. Lit. 326, a.

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particular tenants are so seised, or against any other, with voucher over of such particular tenants, or of any having right or title to any such particular estates, shall (as against the reversioners or them in remainder, or against their heirs and successors) be clearly void; except any such person shall so recover without fraud, by reason of any former right or title; and except also recoveries had by the consent or agreement of the person in reversion or remainder, appearing of record in any of the king's courts.

Common recoveries now, therefore, suffered by tenant by the curtesy, tenant *apres* possibility, tenant in dower, or for life, either as immediate tenants or as vouchers, without the assent, and to the prejudice of him in reversion or remainder, are void, as against the heir, issue or remainder-man, as the case happens; and good only as against the parties themselves.

The next statute relating to common recoveries is 34 & 35 Hen. 8, c. 20, by which persons having estates-tail of the gift of the king, with remainder to the king in fee-simple or fee-tail, are prohibited from suffering recoveries; that act declaring, "that no recovery thereafter to be had by assent of parties, against any tenant or tenants in tail, of any lands, tenements and hereditaments, whereof the reversion or remainder, at the time of such recovery had, shall be in the king, shall bind or conclude the heirs in tail; but that after the death of every such tenant in tail, against whom such recovery shall be had, the heirs in tail may enter, hold and enjoy the lands, &c. recovered according to the form of the gift in tail, the said recovery notwithstanding (1).

(1) See many cases put respecting the barring of entails, &c. where the remainder or reversion is in the crown, *Fig. on Renov.* 87 to 92.

III. OF WHAT THINGS A COMMON RECOVERY MAY BE SUFFERED; AND BY WHAT DESCRIPTION:

1. *Of what a Recovery may be had.*

A COMMON recovery may be suffered of all things, of which a writ of covenant for levying a fine lies; as of an "honor, island, barony, castle, messuage, curtilage, dove-house, land, meadow, pasture, underwood, chapel, river, county, warren, rectory, view of frankpledge, waife, estray, felon's goods, deodands, furze, heath, moor, &c.; and in general, a recovery may be had of any thing of which a writ of entry will lie*.

It may be also of an advowson^f, i. e. of an advowson appendant to a manor, but not of an advowson in gross; (for the parson has the freehold, and therefore it ought not to be by writ of entry in *le post*, but by writ of *droit*^g); as, since the stat. 32 Hen. 8, c. 7, it may of any other ecclesiastical or spiritual profits, as tithes, oblations, portions, pensions, or the like^h. A common recovery may, however, be suffered of an advowson in gross, and a small quantity of land on a writ of entry *sur disseisin*, and there are many precedents to this purposeⁱ(1). So of an annual pension or rent, because common recoveries are common assurances^k. So it may be of a rent *de novo*; and therefore, if

* Pig. Recov. 96; Cru. 163.

163.

^f 4 Co. 74.

^g Pig. 9; *sed contra*, 5 Co. 40; Poph. 22.

^h Cru. 163.

ⁱ *Bayley v. University of Oxford*, 2 Wils. 116.

^k 5 Co. 40; Poph. 22; 2 Vent. 32; 2 Rol. Rep. 67.

(1) The court, however, said, in *Bayley against The University of Oxford*, that if this were *res integra*, they should have determined differently; but there being sixteen precedents found where an advowson in gross, and a little land had been suffered upon writs of entry *sur disseisin*, they adjudged the recovery good upon the principle that *que fieri non debet factum valet*.

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one grants a rent to *B.* in tail, remainder to *C.* in tail, the remainder to *C.* may be barred by a common recovery¹.

A recovery may also be suffered of a rent-charge if issuing out of real estate; but not of an annuity chargeable only on the person or personal estate of the grantor².

But it is said, that a common recovery cannot be suffered of a fishery, common of pasture or estovers, nor of a quarry, a mine or market, because they are not in demesne, but in profit only³.

Copyholds.

Although copyhold estates may, according to the better opinion, be entailed even without a custom, yet no recovery can be had of them at common law, as well because in the eye of the law they are only tenancies at will, as because the copyholder cannot make any tenant to the *præcipe*, but by surrender. The way, therefore, to suffer a recovery of a copyhold entailed⁴, is, by the mode pointed out by the custom of the manor, as either by committing a forfeiture, by making a lease without license of the lord, or the like; and the lands being seised into the lord's hands, are appointed to be to the use of the tenant and his heirs; or by tenant in tail committing a forfeiture, and the lord seising the copyhold, and then granting it to the copyholder and his heirs; or for tenant in tail to make a surrender to the purchaser and his heirs, and the purchaser to commit a forfeiture, on which the lord seises, and he makes proclamations; all which modes, if sanctioned by the custom, will be a good bar of the entail and the remainders over⁵. And where there is none of these customs, the way to bar an entail is by the tenant in tail surrendering to a person to make him tenant to the *præcipe*, (i. e. to a plaintiff) who is admitted, and then a plaintiff, in the nature of a writ of entry in the post, is brought against him, who vouches the tenant in tail, and he the common vouchee; and then the recoveror sur-

¹ Sid. 285; 2 Keb. 55.

² See Pig. 102.

³ Pig. 97. See *Turner v.*

⁴ Sid. 315; 1 Keb. 752;

Turner, 1 Bro. Ch. Rep. 316.

⁵ Ibid. 127.

⁶ Pig. 96; 18 Vin. Ab. 218.

renders to the use of tenant in tail and his heirs, who is admitted accordingly, and thereby the estate-tail and remainders are barred¹.

R. RECOVERIES.

But though a recovery in the Common Pleas will not pass lands held by copy of court-roll, yet a recovery in that court of customary freeholds passing by surrender in a borough court, will, it seems, be good².

Customary freeholds.

As to recovery of lands in ancient demesne, a common recovery is good, and stands in force till reversed by the lord by writ of disceit³, as in the case of a fine levied of ancient demesne lands.

Ancient demesne.

A recovery may be had of a trust estate, as where *cestui que trust* in tail is in possession, with remainders over, under the trustees, who have the legal estate, and suffers a common recovery; though in this case there is no legal tenant to the *præcipe*, yet this recovery will bar both the estate-tail, and remainder and reversion; for a trust being a creature of equity, any conveyance or assurance of *cestui que trust* shall have the same effect and operation on the trust as it would have had on the estate in law, in case the trustees had joined: for otherwise, trustees, by refusing to join, or not being capable to execute the trust, might hinder the tenant in tail of that liberty to dispose of his estate, and bar the entail, remainders and reversion thereon expectant, which the law gives him as incident to his estate⁴. This was determined in the case of *Eaton v. Collier*⁵, after solemn argument, and is now the constant practice of equity.

Trusts.

2. By what Description a Recovery may be suffered.

Strictly speaking, the same accuracy should be observed in the description of things of which a recovery is suffered,

By what description.

¹ Coke Ent. 206, 207, pl. 10; Pig. Recov. 10.

² *Oliver v. Taylor*, 1 Atk.

474.

³ 4 Leon. 123.

⁴ 2 Chan. Rep. 63, 79.

⁵ 1 Vern. 13, 226, 440;

2 Ibid. 132; 1 P. Wms. 91;

2 Ibid. 134; 1 Atk. 473.

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as is requisite in a *præcipe quod reddat* in an adverse suit; but recoveries being now settled to be common assurances, to establish men in their purchases, they are very much favoured by the judges, and not compared to judgments in other real actions or adverse suits*, and the proceedings are consequently less strictly construed. Hence, though the statute of Westminster 2, c. 5, says, *non sint nisi tria brevia originalia* for the recovery of advowsons, yet a writ of entry in the *post* has been admitted for an advowson in gross, because this being the original writ in these common recoveries, which are suffered by the consent of parties, the judges have allowed advowsons, as well as rents and other incorporeal inheritances, to pass by recoveries, *quia consensus partium tollit errorem*; so it is of commons in gross; and if this should not be allowed, there would be no method of barring the remainder or reversions depending upon estates-tail, which the tenant in tail, in every other case, has a power over†.

And it appears to be now an established rule, that wherever the description is such, either in respect of the quantity, quality or place, as is sufficient to ascertain and identify the land intended to be conveyed by it, or which would be good in a deed, will be good in a common recovery‡.

If, therefore, a man be seised of a reputed manor, which really is no manor, and he suffer a common recovery of this by the name of a manor, this is a good recovery of the lands which constituted the reputed manor, though, strictly speaking, there is no manor recovered; because the law supports this, as all other conveyances, according to the intention of the parties; for it would be severe to vacate this conveyance when the purchaser recovered them,

* 2 Inst. 353; Poph. 22, 23; 2 Vent. 32; Cowp. 346.

† *Dormer's case*, 5 Co. 40; Poph. 23. See *Mussey v. Rice*, Cowp. 346.

‡ 5 Co. 40; Poph. 22; 1 Burr. 623; Mod. 206, 350; 2 Ibid. 47; Cru. Recov. 165.

by the assent of the vendor, under such a demonstration*.

So if a recovery be suffered of a manor and its appurtenances, lands which have been reputed parcel of the manor shall pass; for it is but equitable, *quod voluntas domini volentis rem suam in diu transferre rata habeatur*; and though the recovery does not mention the lands reputed parcel of the manor, but only the manor itself, yet this may be supplied by the indenture if that be of the manor, and all lands are reputed parcel thereof, though occupied together but two years^b (1).

And if a man having a third part of a manor, suffers a recovery of a moiety of the manor, this is good to pass his interest in the third part^c; for where the words of a conveyance (which a recovery is now considered to be) contain more than the grantor can convey, it would be an unreasonable interpretation to make this void and entirely useless, when they are sufficient to convey so much as he may lawfully pass; so if the recovery, in this case, had been of the third part of the manor, by the name of the moiety, part and purparty of the manor, this had been good for the whole third part, and not only for a moiety of such third part; for, common recoveries being but common assur-

* 2 Rol. Abr. 396; 6 Co. 64; 2 Rol. Rep. 67; 2 Vent. 32, S. P. See Cro. Eliz. 507, 524, and Keb. 591, 691, *contra*.

^b Sid. 190; Lev. 27; Keb. 591, 691; 2 Mod. 235; S. C. *Thynn v. Thynn*.

^c *Isham v. Merria*, Gro. Car. 109, 110.

(1) Note, that in all the books which report the case of *Thynn v. Thynn*, *supra*, it is said, that as to *Sir Mayle Finch's* case (which see, 6 Co. 63), all the judges of England gave their opinions under their hands, that the lands in reputation, belonging to that manor, should not pass; but that Coke, after he was made chief-justice, got it adjudged otherwise, and so it hath been holden ever since; and this judgment was approved, because many settlements depended on it.

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ances, have, like other assurances, a benign and large construction, to meet the intention of the parties.

**IV. IN WHAT COURT RECOVERIES MAY BE SUFFERED;
AND OF THE MANNER IN WHICH THEY ARE TO
BE SUFFERED.**

1. In what Court.

As a real action cannot be commenced in any other court than one of the courts at Westminster, it follows that recoveries cannot regularly be suffered in any other court. But by special custom and some particular statutes they may be suffered in inferior courts. As by the special custom of London, common recoveries may be suffered upon writs of right in the court of hustings there, of lands lying within the precincts of that city^d. So in the port moot of the city of Chester, where the lands lie within the precincts of the county of that city^e. So recoveries of lands lying in the counties palatine of Lancaster and Durham may be suffered in the courts of those counties respectively^f. And by 34 & 35 Hen. 8, c. 36, s. 40, common recoveries are allowed to be suffered in the court of great sessions in Wales. And by the custom of most manors, common recoveries may be suffered of lands holden in ancient demesne and copyhold lands in the courts of the manor; for as they cannot sue or be sued in respect of lands holden by those tenures in the courts of Westminster, they have always been allowed the privilege of commencing actions in the manor court^g.

2. Of the Manner and Form of suffering a Recovery.

Under this head will be considered in particular, 1. The writ of entry: 2. The tenant to the *præcipe*: 3. The vouchers: 4. The judgment: and 5. The execution on the recovery.

^d 5 Co. 57, b.

^e Cru. 161; and see 43
Eliz. c. 15, s. 4.

^f Cru. 162.

^g Ibid.

1. Of the writ of entry.

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A common recovery being a judgment in a real action, it of course cannot be regularly commenced without an original writ demanding the lands in question^a. And this writ may be of any kind upon which land may be demanded; but that which is generally used for this purpose is a writ of *entry sur disseisin* in the nature of a writ of assize, in which the demandant is supposed to have been disseised or turned out of possession by the person against whom the writ is brought, or the person under whom he claims. This writ may be brought in the *per*, the *per & cui*, or the *post*; but that always used at this day, is the writ of entry in the *post*, of the demandant's own seisin, which was probably chosen for the purpose of common recoveries, on account of the tenant being allowed to vouch at large in this action, and not bound to vouch within the degrees, as he is in the writs of entry in the *per* and *cui*, which makes it the safest action for the purchasers; as not being liable to be reversed by writ of error for irregular vouching^b.

Of the writ of entry.

This writ should be similar in its form and construction, to the same writ when used in an adversary suit, but as it is known to be an amicable suit instituted merely to effect a conveyance of the lands, it is more liberally construed than in adversary suits, and any errors by misnomer or otherwise, which may be discovered in it, as well as in the subsequent proceedings in the suit, will, in general, be suffered to be amended at any time prior to the exemplification of the recovery^c.

2. Of the tenant to the *præcipe*.

Of the tenant to *præcipe*.

In considering of this part of a recovery, we may inquire, first, of the necessity of a tenant to the *præcipe*; secondly,

^a 3 Co. 3, a; 1 H. Black. Rep. 526; *Reg. Cur.*

^b See *Cru. Recov.* 18, 203; *Pig.* 167.

^c Booth on Real Act. 176.

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Who may make
tenant to the
præcipe.

who is capable of making a good tenant to the *præcipe*; and thirdly, by what species of conveyance.

In every real suit there must be a demandant and tenant; the demandant is the party grieved, and who, in the course of justice, demands a reparation for the wrong done him. The tenant is the wrong-doer, and who withholds the land or other thing demanded; so that though common recoveries are deemed to some intent fictitious, yet there must be *actores fabula*, for which reason there must be a tenant to the *præcipe*; that is, the writ of entry must be brought against one that is actually seised of the freehold by right or by wrong, or else the recovery is void; for real writs lie only against the tenant of the freehold¹. And if there is not a good tenant to the freehold, he cannot render the land as the writ commands; or in other words, the freehold cannot be recovered of him who has it not².

But if there be a good tenant to the *præcipe*, any time before the return of the writ, it is good even in adversary writs, for if the tenant was not tenant at the teste of the writ, but was before the return, it was well. If he were not tenant at the return of the writ, he might abate the writ by pleading non-tenure; but if he vouched over, then as to himself he admitted the writ good; but then the vouchee might counterplead the tenancy; but if the vouchee does not counterplead the tenancy, it is good against them all by estoppel. But in this case the tenant shall not recover in value, because he is at no loss; but if he become tenant after the voucher, and before judgment is given, where the vouchee is summoned *ad warrantizandum* by writ, and appears at the return³, then the judgment not being given on the *præcipe*, but on the last voucher, this judgment binds the land; so that when the recoveror takes out execution, the tenant by a subsequent purchase cannot

¹ Booth, 3.

² Pig. 28; Cru. 21.

³ *Lacy and Williams's case*,

2 Salk. 568; Lord Raym.

227, 475.

avoid this, for the tenant is become a loser, and shall recover in value against the vouchee, and the vouchee over°. Now if it be thus in adversary writs, much more in common recoveries, which are by the assent of parties.

There is another reason why a tenant to the *præcipe* is necessary; viz. because the estate-tail of the vouchee is barred only in respect of the assets recovered, or which by possibility may be recovered in value: now till the demandant sues execution against the tenant to the *præcipe*, the tenant cannot have execution against his vouchee, nor such vouchee against his vouchee; and if the tenant to the *præcipe* had nothing in the land, no execution can be sued against him, and if no execution can be sued against him, no recovery can be had over in value, and consequently no recompense to bind him, and the recovery, therefore, can be no bar(1).

And the law is now settled, that if there be no tenant to the *præcipe*, the common recovery is void, and the issue in tail may falsify, that is, reverse it for this error; for the recovery in value goes to him that has the loss, or loses the tenancy; and he that loses may aver against a stranger that he lost nothing, so shall recover nothing: and if so, *à fortiori*, the issue in tail, who comes paramount all conclusions and estoppels, may aver that there was no estate at the time of the writ°.

° Mut. 112, 113.

Ediz. 21; Moor, 255; 4 Leon.

° 3 Co. 5, 6, 60, 2; 12 Ed. 4, 23.

12, 19; Cro. Car. 309; Cro.

(1) And to enforce this, Littleton, in *Taltarum's* case, says, when there is no tenant to the *præcipe*, there is no recovery, because there is none against whom the demandant may recover the land, and a recovery proves not the tenement seised, but supposes it. But Plowden, in *Manxwell's* case, endeavours to prove that a common recovery may be good, where there is no tenant to the *præcipe*. His arguments, however, seem to centre in this, that all parties and privies to the recovery are estopped to say there was no tenant to the *præcipe* against the admittance on record; but it is to be observed, that estoppels bind not the issue in tail.

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But if the tenant to the *præcipe* acquire the freehold at any time before judgment given, it will be sufficient^a. Therefore, where on a writ of error to reverse a common recovery, the error assigned was, that the tenant to the *præcipe* had not acquired the freehold until after the *teste* of the writ of *summonas ad warrantizandum*, so that he was not seised of the freehold at the return of the writ of entry: the court held it to be sufficient, if he acquires the freehold at any time before judgment is given^b. And if he have it when judgment is given, although the estate be afterwards defeated, yet the recovery will nevertheless, seems, be good^c.

And although a person has acquired the freehold by disseisin, yet he will be a good tenant to the *præcipe*^d.

It has been doubted whether an heir at law can make a good tenant to the *præcipe* of the third part of the wife of the ancestor entitled to dower^e; but as the law casts the freehold of this third upon the heir immediately upon the ancestor's death^f, which is not displaced until it has been regularly assigned to the doweress, there appears to be no doubt but a tenant to the *præcipe* made by the heir would be good.

It is now settled (though formerly doubted^g), that a husband seised of lands *jure uxoris* can make a good tenant to the *præcipe* without the concurrence of his wife^h. For "if a man takes to wife a woman who is seised in fee, he gaineth by the intermarriage an estate of freehold in her rightⁱ." And where the wife is seised of an estate-tail^j, or of an estate for life only^k, it will be the same; for a

^a Fig. 30.

^z Gilb. Ten. 26; Co. Lit.

^b *Lacy v. Williams*, 2 Salk. 241, a, n. (1).

568; 1 Ed. Raym. 222, 475;

^f Cru. 58.

Carth. 372.

^g Co. Lit. 325, b. n. (2),

^h *Anon.* 4 Leon. 84; Golds.

s. 3.

12.

ⁱ Ibid. 351, a. 273, b.

^j *Lincoln College* case, 3

^b Gilb. Ten. 108; 1 Rol.

Rep. 58; *Griffin v. Stanhope*,

Abr. 845.

Cro. Jac. 454; Fig. 40.

^c 1 Rol. Abr. 845; Cru.

^d Cru. Rec. 25.

61; Fig. 72.

feme covert cannot have a seisin distinct from her husband; but otherwise where lands are given to husband and wife jointly, and the husband alone suffers a recovery^d; for the recompense cannot enure to the estate, the wife having a joint estate with her husband, she cannot be a partaker of the recompense, because she was no party to the recovery; for an estate holden by husband and wife is an entire estate, and not moieties between them^e; but not so of a joint estate conveyed to them before the coverture, for there one moiety would be barred^f.

As it is absolutely necessary that the tenant to the *præcipe* should have an estate of freehold, it follows, that no person who has not an estate of freehold can of himself suffer a common recovery, because he cannot convey a freehold to the person against whom the writ is to be brought^g. Thus, where an estate was limited to *D.* for ninety-nine years, if he should so long live, remainder to trustees and their heirs for preserving contingent remainders; remainder to the first and other sons in tail. *D.* having issue a son, they joined in levying a fine to make a tenant to the *præcipe* to suffer a recovery; but it was held bad, for want of the freehold in the conusors, for *D.* had only an estate for years, and the son only an estate in remainder expectant on the determination of the estate of the trustees.

And it is not only necessary in order to enable a person to make a tenant to the *præcipe* for suffering a recovery that he should have an estate of freehold in him, but such freehold must likewise be a freehold in possession; for, as has been before observed, unless the person against whom the writ is brought, be actual tenant in possession

^d 2 Inst. 342.^e Owen, 129, 130; Moor,^g *Dormer v. Parkhurst*,

3 Atk. 155; 4 Bro. P. C. 405; and see 1 Keb. 735,

^f *Marquis of Winchester's* case, 3 Co. 1; Moor, 95.

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of the freehold at the time the judgment is given, it is impossible for him to perform the mandate of the writ by delivering the possession of the freehold to the conusee; hence it followed (before the statute 4 Geo. 2, c. 20), that where the lands were let out on leases for lives, or where there was an estate for life prior to the estate of inheritance, the persons entitled to the estate-tail in remainder were disabled from suffering recoveries of them¹. To remove the disability in the first instance, it was usual for the person who intended to suffer the recovery to get a conditional surrender from the lessee for life, in order to become seised of a freehold in possession, and be thereby enabled to make a good tenant to the *præcipe*². But this being productive of several inconveniences, by the lessees being in some cases unwilling, and in others incapable, for want of age, &c. to make such surrenders, which often occasioned great trouble, difficulty, and expense to the tenants in tail, it was enacted by statute 14 Geo. 2, c. 20, with a retrospect and conformity to the ancient law³, that common recoveries suffered in his Majesty's court of Common Pleas, or any other court having competent jurisdiction, shall be good, without the surrender of such leases, or the concurrence of the lessees. But although this statute has made the surrender of leases for lives unnecessary, yet it does not extend to estates for life which were created prior to the estate of which the recovery is intended to be suffered: such estates must, therefore, still be surrendered to the person against whom the writ of entry is brought, it being expressly provided by 20 Geo. 2, c. 20, s. 2, that nothing, in that act contained, should extend to validate any common recoveries, unless the person entitled to the first estate for life, or (if there be no estate for life in being) other greater estate in reversion or remainder, next after the expiration of such leases, shall join

¹ *Dormer v. Parkhurst*,
3 Atk. 135; 4 Brown, P. C.
405.

² Fig. 41.

³ 1 Burr. 115; Cru. 32.

in conveying an estate for life at the least, to the tenant to the *præcipe*.

But common recoveries being now looked upon as common assurances, for the conveyance of property with the assent of parties, the courts have, in some cases, in support of these assurances, conceived themselves justified in presuming a surrender of the estate of the tenant for life, though no such surrender be proved to have been made. As where the recoveror has been for many years (forty years for instance^k) in possession under the recovery^l. This presumption must, however, have some reasonable foundation, as length of possession, or other collateral evidence; and where a man has power to suffer a recovery, there is solid and reasonable ground for presuming that all was done rightly and regularly until the contrary appear^m. Thus, where the freeholder is a trustee for the tenant in tail himself, and under his power and direction, it is a reasonable and just cause for presuming that every thing was regularly transacted; so where the persons interested to object against the validity of the recovery, have had time and opportunity to object to it, without doing so, this forms a presumption that all was right and regular; in short, where a person has a power to bar or alien, every presumption will be entertained to prevent slips or omissions in legal forms and methods of conveyancing from invalidating the efficacy of any attempt he may make to execute such power; but there can be no presumption in the nature of evidence, in any case, without something from whence to make it, some ground upon which to found the presumption.

The absolute necessity of a tenant to the *præcipe* to support a common recovery, made it formerly essential, that if such tenant was created by feoffment, the livery of seisin

^k 2 Stra. 1129; 1 Vent. 257; *Warren v. Greenville*, 257.
^l 2 Stra. 1129.
^m *Goodtitle v. Duke of Chandos*, 2 Burr. 1065.

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should be made, and if by lease and release, &c. then it should bear date and be executed before the return of the writ. Where, therefore, a writ of entry was returnable on the 26th of November, and the lease and release for making a tenant to the *præcipe* were dated the 26th and 27th of November, the recovery was held to be void; for, as it must be presumed he appeared to the writ on the day of the return, and that judgment was then given, it was plain there could not be any tenant to the *præcipe*, the deed creating such tenant not having been executed till the day after^a. And so all deeds to make tenants to *præcipes* were required to be dated before the term in which the recovery was suffered, because the term being considered as but one day in law, all the transactions of the term relate to the first day of the term, which carries back the date of the recovery to a day prior to the date of the deed creating the tenant to the *præcipe*^b. But to remedy the many inconveniences which arose by this strict construction, and also to prevent recoveries being impeached at a remote distance of time, for want of the recoveror being able to prove the existence of a good tenant to the *præcipe* when the recovery was suffered; it is enacted by 14 Geo. 2, c. 20^c, that every common recovery shall, after the expiration of twenty years from the time of the suffering thereof, be deemed good and valid, if it appears upon the face of such recovery that there was a tenant to the writ: and if the persons joining in such recovery had a sufficient estate and power to suffer the same, notwithstanding the deed or deeds for making the tenant to such writ should not appear.

And further^d, that every recovery shall be deemed good and valid, notwithstanding the fine or deed making the tenant to such writ shall be levied or executed after the time of the judgment given in such recovery, and the

^a Pig. Rec. 58.

^b Ibid.

^c Sect. 5.

^d Sect. 6.

award of the writ of seisin, provided the same appears to be levied or executed before the end of the term, great session, session, or assizes, in which such recovery was suffered; "the sense of which clause is, that the recovery shall be valid, provided the deed making the tenant to the *præcipe* was executed before the end of the term in which the recovery was suffered."

3. Having now inquired sufficiently into the necessity and reason of a tenant to the *præcipe* for suffering a recovery, we will proceed to consider the nature and use of the *voucher* in this assurance.

Of the vouchers
in common re-
coveries.

A voucher Lord Coke describes to be, "when the tenant calls another person into court, who is bound to him to warranty, either to defend the land against the demandant, or else to yield him other land of equal value."

When the tenant to the *præcipe* has a writ of entry brought against him, for the purpose of a common recovery being suffered, he appears either in person or by attorney, and takes upon him the defence of his title to the land; this he does by what is called vouching to warranty, that is, by alleging that he purchased the land of another, who in the conveyance bound himself to warrant and make good the title; he therefore prays that such person may be called in to defend the title in pursuance of his warranty; and he who vouches is called the voucher; and he who is vouched, the vouchee (1).

* Per Kenyon, Ch. Just. see *Goodright v. Rigby*, 2
5 Durnf. & East, 177; and Hen. Bl. 46.
Co. Lit. 101, b.

(1) But if the vouchee or the tenant cannot appear personally in court, he may give a warrant of attorney to some other to appear for him; 2 Cru. 107; 23 Eliz. c. 3, s. 5; which must be acknowledged either before one of the judges, or a justice of assize where the lands lie, or before commissioners appointed for that purpose by *dedimus potestatem*. Ibid. Fitz. N. Br. 17.

And where a recovery is suffered by warrant of attorney,
the

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But in all possessory actions, if the tenant vouches to warranty, and the demandant counterpleads the voucher, *i. e.* denies the tenant's right to vouch any person, averring that the tenant or his ancestor was himself the first person who entered, he shall be received in all writs of entry that make mention of the degrees, for none shall vouch out of the lien; but if a disseisor make a lease for life, remainder in fee, and disseisee brings a writ of entry in the *per* against the lessee for life, who makes default, and he in remainder is received, he may vouch out of the degrees, and a voucher is properly on a feoffment with warranty; but on a release with warranty, the party is put to his *warrantia chartæ*†.

When the vouchee has entered into and accepted the warranty, he stands in the place of the tenant, and becomes, in judgment of law, tenant to the demandant, who then counts or declares against him, in the same manner as he did before against the first tenant to the writ, and the same pleas or matter of defence which the tenant

† M. 12 H. 7, 3.

the warrant of attorney is the foundation of the recovery: if, therefore, the acknowledgment of this be void, either on account of any legal disability in the person who acknowledged it, or the like, the recovery suffered in pursuance of it is void also. So if the tenant or vouchee die before such attorney has appeared for him, the recovery will be void; for, upon the death of the person who delegates an authority, the authority ceases; *Wynne v. Wynne*, 1 Wils. 35. So if the warrant of attorney appear to have been executed after judgment in the recovery, the recovery will be void; for the appearance of the attorney is in this case without any authority, and therefore nugatory; *Dyer*, 220, pl. 13; 2 Cru. 110. And the warrant of attorney ought to bear date after the teste of the writ of summons; for till then there could be no reason for his being appointed; this, however, it has been held, will not vacate the recovery, since recoveries have been construed as common assurances; *Wynne v. Lloyd*, Sir T. Raym. 16; 1 Keb. 459.

might have set up is allowed to the vouchee, as also any matter which may have since arisen". Thus, if a *præcipe quod reddat* be brought against *A.* who vouches *B.*, and *B.* enters into warranty, and afterwards the demandant releases all his right to *A.* the vouchee may plead this, as he may also a release to himself by the demandant¹; for the demandant may release to the vouchee, for although the vouchee has nothing in the land, yet when the vouchee admits and enters into the warranty, he becomes tenant to the demandant, and there is therefore then a privity between them².

A recovery, we have observed, may be had either without any voucher at all, or with single, double, or treble voucher. Single and double voucher.

If a recovery be had without any voucher, the issue in tail is not barred; for the recompense in value being the reason of barring the issue, a recovery by default, confession, or *neint dedire*, binds not the issue; for he, having no recompense, is not estopped by his father's judgment; for he claims paramount the estoppel *per formam doni*, and therefore in this case the issue may falsify³.

And if the recovery be with single voucher, it will be good to bar that estate only which the tenant was in possession of at the time of the recovery, but no other estate; but if with double voucher, and the tenant in tail comes in as vouchee, then it bars not only all the estates he has in possession, but all others, even though discontinued and turned to a right; so that a common recovery with a double voucher is in all cases most safe. The reason of this difference between a common recovery with single and double voucher is, that in a common recovery, with single voucher brought against tenant in tail, who vouches over the common vouchee, if the party be in of another estate, the issue, after tenant in tail's death, may plead *neint tenant' tempore*

¹ 1 Inst. 241.

² Jenk. Cent. 100.

³ 3 Co. 29.

⁴ Fig. 108.

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brevis nec unquam postea, and so the recovery be void ; for he is not estopped, because at the time of the writ, not being tenant of the estate-tail, he can have no recovery over of that estate, for he was not seised of it, and a common recovery does not prove the tenant was seised of an estate-tail, but supposes it, and at the time of the recovery, he being in of another estate, the issue has a right to the first entail, notwithstanding the recovery ; and if the issue enters after the death of tenant in tail, he is remitted ; so if tenant in tail discontinue in fee, and re-purchases the land, and grants a rent and dies, the issue shall hold it discharged ; and though the ancestor has judgment to recover in value against the common vouchee, that binds not the issue, for he cannot recover in value of the first entail, for that was discontinued, and a new estate taken, and the donor cannot warrant, by reason of the first entail, because the tenant is in of another estate, and this recovery in value cannot go to the estate-tail, because the tenant was in of another estate : and whether the tenant in tail shall recover in value against the donor or his heirs, or against an estranger, by reason of a release with warranty, is all one ; for the land recovered in value against the donee (who by supposition in law is always supposed to be vouched by the donee, who suffers the common recovery) or releasor, must be an estate-tail as well in one case as the other : but if he who recovers in value was not in of the estate-tail, then the land recovered in value cannot go in lieu of the estate-tail ; for it is a rule that an estate-tail shall never be avoided by a recovery in value, if that which is recovered in value comes not in lieu of the estate-tail, which it does not in this case, and therefore it defeats not the estate-tail, but that descends to the issue ; and by his entry and getting the possession, that, coupled with the right, remits him ; and this being no more than a recovery on a false title, amounts only to a discontinuance.

So where tenant for life, remainder to *B.* in tail, the remainder to *C.* in fee, *A.* and *B.* join in a fine *come ceo*, &c.

to a stranger, who renders it to *A.* for life, remainder to *B.* and his heirs; afterwards *A.* and *B.* suffer a recovery with single voucher to the use of *B.* and his heirs; this recovery did not bar the remainder in fee, because by the render they were seised of a new estate, and *B.* was not either tenant in possession, or seised in right of the entail; and consequently the recompense being given in lieu of the estate recovered, the tail could not be docked, nor the remainder-man barred by this recovery, because the tenants to the *præcipe* were not seised of it at the time of the recovery suffered^b. So in the common case of limitations under a settlement, as where *A.* was tenant for life, remainder to trustees to preserve contingent remainders, remainder to the first and every other son in tail male, remainder to the daughters in tail general, remainder to the heirs of his body, with remainders over. *A.* suffers a recovery with single voucher, being himself tenant to the writ. Adjudged by the House of Lords, that this recovery with single voucher did not bar the remainders over^c; for, as has been before observed, the tenant who loses the land has, upon his vouching over, a recompense in value adjudged against his vouchee, which is to go in the same succession as the land recovered would have gone^d: now a recovery with single voucher is sufficient to bar an estate-tail where the tenant in tail is tenant to the *præcipe*, and seised of the lands in tail at the time of the *præcipe* brought against him, for the recompense in value must follow the descent of the land which the tenant loses, and when that proves to be the estate-tail, then the issue is supposed to have an equivalent for it, and consequently not prejudiced by the recovery; but because a single voucher can bar only the estate which the tenant is seised of at the time of the *præcipe* brought, and not any

^b Cro. Eliz. 827; *Peck v. Channel*, Moor, 634.

^d Bro. tit. Recovery; *Yelv.* 51; 3 Co. 5; Moor, 256;

^c *Meredith v. Leslie*, 6 Br. see Cru. 244.

P. C. 209; Cru. 249.

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right which he hath, it was found necessary to admit the use of a double voucher; for should tenant in tail discontinue the tail, and take back an estate in fee, or disseise the discontinuee, a recovery against him with a voucher over, could not bar the estate-tail; for the recompense comes in lieu of the land recovered, which was the defeasible estate, and consequently the issue has nothing in value for the estate-tail, without which he cannot be barred. But if in this case the tenant in tail, after the disseisin, had either by fine or lease and release, made a tenant to the *præcipe*, and come in himself as vouchée, and then vouched over the common vouchee; this double voucher had been sufficient to bar the tenant in tail and his heirs of every estate which he was at any time seised of; for when the tenant in tail comes in as vouchee, it is presumed he will, and he has an opportunity to, set up every title he had to defeat the demandant; and since what he offered was not sufficient to bar the demandant, the court takes it for granted he had no other title than what he set up, and therefore will give him but one recompense for all*.

But in the case of a recovery with single voucher, where the tenant is in of another estate, the land recovered in value cannot be in lieu of the estate he was not seised of when he was tenant to the *præcipe*, so the recovery is no bar to the issue, who can never be barred but where there is a real or possible recompense by recovery in value. And therefore, if there be a woman tenant for life, remainder to A. in tail, remainder over in fee; feme and A. intermarry, and she and her husband levy a fine *sur consuance de droit come ceo*, and the lands are rendered to the wife for life, remainder to the husband in fee, and after they suffer a common recovery with single voucher, this is no bar to the entail, for the husband was not seised of the entail at

* 3 Co. 6, b; Plow. 8; 562; Poph. 100; Moor, 365; *Marwell's case*, Cro. Eliz. Hob. 263.

the time of the recovery, and the fine, according to Coke, was no discontinuance¹. And by the render a new estate is given, so the recompense extends to the new estate, not to the old one. So if tenant in tail discontinues, and take back an estate in fee, and a *præcipe* is brought against him, and he vouches the common vouchee, this bars not the estate-tail, but only the new taken fee. But if tenant in tail discontinues, and a *præcipe* is brought against the discontinuée, who vouches tenant in tail, who vouches over, this bars effectually the estate-tail: for he who comes in as vouchee in judgment of law, comes in privity of all estates he ever had before, though the precedent estate, on which the voucher depends, is divested, discontinued, and turned to a right; for in this case, where he comes in as vouchee, he comes not only in of the estate he has in possession, but of the discontinued estate, and all other estates, and the recompense in value which he has, or possibly may have, bars the issue².

4. Of the judgment in a common recovery.

Upon the person who is last vouched to defend the title, failing to appear and make his defence when called, and “departing in spite of the court,” judgment is given for the demandant, that he shall recover the land against the tenant in possession, *i. e.* the tenant to the writ of *præcipe*; and that such tenant shall recover of the vouchee who neglected to substantiate the title in pursuance of his supposed warranty, other lands of equal value, in their room.

Of the
Judgment.

As the parties to the recovery are not bound by the recovery till judgment is pronounced (till which time the action is *in transitu* and incomplete), it is necessary to inquire at what time the judgment in a common recovery is supposed in law to be pronounced by the court, and in what cases the recovery will be invalid by reason of any

¹ 1 Co. 76, a; 6 Co. 15, a.

² 3 Co. 60; Moor, 634; Owen, 130.

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inconsistency in the time at which judgment is presumed to have been given, on the death of the parties prior to the pronouncement of such judgment.

As to which, it is to be premised, first, that judgments are not always considered as having been given on the day on which they may have been actually pronounced. For as the whole of the term, as has been before noticed, is considered in law as but one day, at whatever period of the term judgment may have been pronounced, it has relation to the first day of such term, the law not allowing of any fraction of a day. And this first day of the term with respect to the process of the court, it is to be observed, is the *essoïn* day upon which the writ was returnable: the *quarto die post* being only a day of grace¹. For it is upon the default of appearance to defend the title, on the day required by the writ, that judgment is given against him. If, therefore, the writ of entry be returnable on the second or any other return-day of the term, the judgment will relate to and be supposed to have been given on that day. So that if the vouchee appear in person on the return of the writ of entry, the judgment in the recovery relates to the day of such return; but if he do not appear till the day of the return of the writ of *sum-moneas ad warrantizandum*, then the day of the return of such latter writ will be the day of the judgment in the recovery. Hence, if either of the parties to the recovery, whether demandant, tenant, or any of the vouchers die before the return of the writ, the recovery will be void, for no judgment can be given against a man after he is dead; but if all the parties were living at the commencement of that day, the recovery will be good¹.

And if the day of the return of the writ be a *dies non juridicus*, as a Sunday, and the vouchee die on that day, the recovery cannot be supported, for as the judgment

¹ Cro. Car. 102; 1 Bulst. 32, 35; 3 Durnf. & East, 185.

¹ 1 Co. 934; Co. 71, a; Moor, 136; Jenk. Cent. 249; 2 Blac. Rep. 735; 1 Stra. 18.

could not in this case have been given till the Monday, it must have been given, if at all, after the death of the party; and then it came too late^k.

So if judgment in a common recovery be given before the return of the writ of entry, or of the writ of *summoneas ad warrantizandum*, the recovery will be void; for no judgment can be given against the party till he appear to make his defence, which he cannot be supposed to have done until the return of the writ which is issued for the purpose of bringing them before the court^l.

So if the warrant of attorney be dated subsequent to the day of the return of the writ of entry, the recovery will be void; for in this case the warrant of attorney empowering another to appear for the party, appears not to have been given until after the judgment in the recovery was pronounced^m.

So where the vouchee of a common recovery, who appeared by attorney, died before the return of the writ of *summoneas ad warrantizandum*, the recovery was held to be void, because it were absurd to suppose that judgment could have been given before the appearance and default of the vouchee, and he could not appear after he was deadⁿ. For though a recovery, being now a common assurance, is to be supported as far as the rules of the law will allow, yet the court will not create absurdities in order to support them; and in a subsequent case^o, Lord Mansfield observed, that "it was plain there could be no judgment given after the death of the vouchee, for there cannot be any judgment against the tenant to the *præcipe* without a judgment over in value against the vouchee.

^k *Swann v. Broome*, 3 Burr. 1595; 1 Blac. Rep. 496, 526; 6 Bro. P. C. 123; 2 Cru. 142.

^l *Barton's case*, Pop. 100.

^m *Bacon's case*, Dy. 220, pl. 13.

ⁿ *Wynne v. Wynne*, 1 Wils. 35.

^o *Sheepshanks v. Lucas*, 1 Burr. 410.

RECOVERIES.

Execution.

5. Of the execution of a recovery, and its effect.

After the demandant has obtained judgment, in a common recovery against the tenant, and the tenant against the vouchee, and the vouchee against the common vouchee, the court awards an *habere facias seisinam* to the sheriff of the county where the lands lie, directing him to put the recoveror in possession of the lands recovered; and when this writ is returned, the recovery is complete and executed (1). And though this is not much regarded, being only matter of form, yet in many cases it is not safe to proceed till there is a return of the *habere facias seisinam*; for whenever a recovery is to uses, as most common recoveries now are, no seisin is in the recoveror, nor any use raised till the execution of the recovery; for till then the land does not pass^p (2), and consequently, no use arising till then, the party to whose use the common recovery is declared to enure, can convey nothing; for *nemo dat quod non habet*.

And if the land of which a recovery is suffered, is in lease for years at the time, it must be executed by writ, entry or claim, for the recovery will not otherwise give immediate possession to the recoveror^q. But if the recovery be of a rent, a right of common, or other incorporeal thing issuing out of land, it is sufficient if the sheriff

^p Moor, 281; Sir W. Jones, 10; 1 Wils. 55; 2 Stra. 1185. ^q 1 Co. 91, b. 106, b.

(1) This writ should bear *teste* the fourth day inclusive after the return of the writ of entry, or last writ of summons, and there should be fifteen days between the *teste* and the return of the writ of seisin. Wils. 319.

(2) And the awarding of the writ of seisin, its execution, and return, must appear on record, for it will not be presumed by the court; unless where it be found on a special verdict. *Witham v. Lewis*, 1 Wils. 48; 4 Bro. P. C. 504. But see 5 Durnf. & East's Rep. 179.

deliver seisin of the rent, &c. upon the land by parol, for this will give the demandant possession^r.

RECOVERIES.

When the recovery is complete, all the proceedings from the original writ to the judgment are usually enrolled in the court where it is suffered, and such enrolment is by 23 Eliz. c. 3, s. 1, declared to be of as much validity as if the recovery were extant and remaining. But as this has been found to be frequently neglected, it was enacted by 14 Geo. 2, c. 20, s. 4, to remedy the inconveniences which might arise to purchasers from the omission, that where any person has purchased any estate in any lands, tenements or hereditaments, for a valuable consideration, of which a recovery has been suffered, such person, and all claiming under him, having been in possession of the purchased estate from the time of such purchase, may, after the expiration of twenty years from the time of such purchase, produce in evidence the deed making the tenant to the writ and declaring the uses of the recovery, and such deed (the execution being duly proved) shall be deemed sufficient evidence of the recovery having been suffered, although no record of such recovery be found, provided the person making such deed had power to make a tenant to such writ and suffer such recovery.

14 Geo. II.
c. 20.

V. OF THE FORCE AND OPERATION OF A RECOVERY.

A COMMON recovery duly suffered by tenant in tail bars not only the issue, but all remainders and reversions, which would take place after the determination of the estate-tail, whether the same be in *esse* or contingent: and all former estates, leases and charges made by him in remainder or reversion^r. The reason of remainders, and charges made by the remainder-men being barred, is given in *Capell's case*,^r where it is observed that at common law, and till the statute *de donis*, the remainder was only

Bars remain-
ders and re-
versions.

^r 1 Rol. Abr. 886; 1 Co.
97, b.

^r And see Prest. Tracts,
26.

RECOVERIES.

a possibility of reverter; and as a recovery was excepted out of that statute, and was an inherent privilege annexed to an estate-tail, and as by it the tenant in tail could have barred the remainder, so he might all charges made by the remainder-man. And as the grantor of that charge was bound by a common recovery, so were those who claimed under him; for the recoveror in a common recovery is in of an estate he has gained under the tenant in tail in possession, which estate is no ways subject to the charge of him in remainder or reversion, for the charge of him in remainder can be only good in respect of the possibility that the land may come in possession, which possibility being destroyed by the common recovery, the remainder and charge are gone¹. But another reason given is², that by the recovery, the estate-tail is extended into a fee, and the recoveror in of an estate, that by supposition of law, continues for ever; so that the estate having a perpetual continuance, no charge of him in reversion can ever take place (1); and this reason accords with common experience; for if tenant in tail make a lease not warranted by the statute, or enter into a judgment or recognizance, and then suffer a common recovery, the lease and other encumbrances are all good, which were before defeasible by the issue; for the recoveror comes in

¹ 1 Co. 61; *Capell's case*,
4 Leon. 150; Poph. 5;
Moor, 154.

² Pig. 119.

(1) See this explained by Lord Chief Justice Hale, in *Benson and Hodson's case*, 2 Lev. 28; and the case on *Lord Derwentwater's* recovery was accordingly determined, under the act 4 Geo. 1, by the judge delegated to hear claims on the forfeited estates, in which case it was resolved, that he took no new estate by the recovery, by way of purchase, but was in of his old estate, which by the operation of the recovery, was extended into a fee-simple, and discharged of the statute *de donis*, Westm. 2, and the limitations and restraints introduced by that statute. Pig. 121.

subject to all the encumbrances of tenant in tail, and the recovery opens, as it is called, and lets in all the encumbrances; and therefore, when a man has to do with tenant in tail whose estate is encumbered by judgments, &c. it is very dangerous, though he suffer a common recovery: for all the precedent judgments take place of the security he gives ^w.

But as to a recovery barring remainders and reversions, ^{Reversions in the King.} an exception is to be noticed, where such remainder or reversion is in the king; for although common recoveries were allowed to be common conveyances, the judges would no more allow a recovery than any other conveyance, to divest the king of his interest in the land, but preserved his reversion or remainder, though they suffered the recovery to bar the estate-tail on which it depended, for it were unreasonable to strip the king of any part of his revenue upon the consideration of any imaginary recompense; but yet the estate-tail was barred, because otherwise, where the reversion or remainder was in the crown, the estate in the subject would be perpetuated, which is against the policy of the law ^x. But in the reign of Hen. 8, a statute was made to invalidate recoveries, even against the issue in tail, where the remainder was in the crown ^y; the intention of the act was, to perpetuate those estates in families which the king himself had given, or, for money or other consideration, had procured to be given to any subject as a *premium* for his services to the crown; that the descendants of that stock might never forsake the interests of the crown that had so liberally rewarded their ancestor's loyalty; that where a generous emulation of their actions proved too weak a tie to engage them openly in the same interest; they might at least be prevailed on, out of gratitude and prudence, not to attempt any thing to the prejudice of the crown, from whom

^w Fig. 121.

Bro. tit. Recovery, 31, tit.

^x 2 Rol. Abr. 393, 396; Tail, 41.

Co. Lit. 372; Moor, 195; ^y 34 Hen. 8, c. 20.

RECOVERIES.

they must acknowledge they derived their present support and splendor; but this statute does not preserve all estates-tail where the reversion or remainder is in the crown; but those only which were given by the king himself or his procurement by way of reward^a, and the reversion also must continue in the crown; for whenever he grants that ever, the estate-tail, though original of the gift of the king, is out of the protection of the act, and subject to a common recovery, because the statute only preserves them where the reversion is in the king. Where, therefore, donee in tail, of the gift of the king, the reversion being in the crown, made a gift in tail, and the second donee suffered a common recovery, it was resolved by eleven judges^b, that his issue was not within the privilege of 34 Henry 8, c. 20, for his estate, as far as it could, disaffirmed the reversion of the king, though it could not take it out of him, and his possession was injurious to the estate given by the king, and therefore no colour to allow it the protection of that act^b. It does not, however, require that the reversion should always continue in the king; but it sufficeth if it be in him at the time of the recovery suffered^c.

Hence the only mode of acquiring a good title to an estate-tail, whereof the reversion is in the crown, is by an act of parliament, enacting that the reversion shall be divested out of the crown, and vested either in the tenant in tail, or in some other private person, by which means it becomes barrable by a recovery^d.

Estoppel.

A common recovery does not only bar the issue, remainders, reversions, and all charges made by remainder-men, but estops all parties; and therefore, if tenant in dower,

^a *Perkins v. Sewell*, 4 Burr. 2223; 1 Blac. Rep. 654; Co. Lit. 372, b.

^b 13 Car. 1.

^c *Earl of Ormond's case*, 2 Jon. 250, 251.

^d See Raym. 288, 358; *Gardner v. Bambridge*, 2 Jon. 251.

^e Cruise on Recov. s. 277; and see *Strickland's Act*, 30 Geo. 3, s. 51.

or a jointress, join in a common recovery, they are barred; and if there be no tenant to the *præcipe*, yet if the party who suffers the common recovery have a fee-simple, he and his heirs are estopped. So if a man seised in fee be disseised, the disseisee, during the disseisin, suffers a common recovery, though this be void for want of a tenant to the *præcipe*, yet the disseisee, and all claiming under him, are estopped^a. So if there be tenant for life, remainder to baron and feme and their heirs, and they suffer a common recovery, or come in as vouchees, this binds them and their heirs^f; and generally all are bound by a common recovery that cannot falsify^g.

A common recovery, we have said, bars also contingent remainders; therefore, where a man is seised in fee, and devised to his eldest son Thomas, for life, and if he die without issue living at the time of his death, to Leonard, another of his sons, and his heirs; but if Thomas have issue living at his death, then the fee to remain to the right heirs of Thomas. Devisor dies, Thomas enters and suffers a common recovery, and dies without issue, and held Leonard barred; for Thomas, by the will, had an estate for life, remainder to his heirs, not executed; and though the reversion descended to him, as heir, this merges not the estate for life, contrary to the express will, but leaves an opening for the interposition of the mesne remainders, when they happen; so the estate here to Thomas, being for life, and the estate to Leonard contingent, the recovery bars it^h. And the reason is because the recovery destroys the particular estate, which supports the contingent remainder; and wherever a contingent remainder is limited to depend on an estate of freehold, which is capable to support a contingent remainder, it is always construed to be a remainder, and not an executory

Contingent
remainders.

^a Cro. Car. 388.

^f Stiles, 319.

^g 2 Cro. 592.

^h Sid. 47; Raym. 28;

ⁱ Keb. 29, 119; Jones, 77;

^j Lev. 11.

RECOVERIES.

devise. And where the remainder is contingent, if the particular estate whereon it depends be destroyed, the remainder is gone. So a devise to *A.* for life, remainder to his next heir male: *A.* suffers a common recovery, the remainder is destroyed¹.

But though a common recovery bars the issue and all remainders and reversions, and all things dependent, incident or derived out of the remainder, yet it bars not things collateral to the estate-tail.

Bars incumbrances.

And as a common recovery suffered by tenant in tail bars all reversions and remainders expectant upon it, so it avoids all charges, leases and encumbrances made by those in reversion or remainder, and the recoveror shall enjoy the land free from any such charge for ever: thus, where he in remainder upon an estate-tail granted a rent-charge, and the tenant in tail suffered a recovery; it was adjudged, that the grantee could not distrain the recoveror; for since the rent was only at first good, because of the possibility of the grantor's remainder coming in possession, when that possibility ceased by the recovery of tenant in tail, such grant must then become void¹.

So where lands were given to the use of *A.* in tail, remainder to *B.* provided that if there be a failure of issue male of the body of *A.* that *J.* should have a rent-charge out of the land: *A.* made lease of the land for 100 years, and then suffered a recovery. It was adjudged, that this contingent rent was barred, and that *J. S.* should not charge the land during the term; for as this grant was subsequent to the estate-tail, and could not take effect till the determination of that, and consequently could issue out of the remainders when they should commence and

¹ *Archer's case*, 1 Co. 66; 396; *Moor*, 154; 4 *Leon.* Cro. Eliz. 453.

² 2 Cro. 592; 2 *Rol.* Rep. 221. 150, &c.; *Poph.* 5, 6; and see *Hudson v. Benson*, 2 *Lev.* 28; 1 *Mod.* 108; *Sir T.*

¹ *Cro. Eliz.* 718; *Co.* 62; *Raym.* 236; 1 *Freem.* 362, *Capell's case*, 2 *Rol. Abr.* S. C.

execute: and as the recovery barred the remainders dependent on the estate-tail, it must also destroy all charges which was to issue out of them; for when by the recovery it became impossible that the remainders should ever execute, the rent-charge, which was to issue out of those remainders when executed, must necessarily be lost^m.

And if there be tenant in tail, remainder for years, remainder in fee, and the tenant in tail suffer a recovery; this bars the remainder for years as well as the remainder in feeⁿ.

But if a gift in tail be made, reserving rent, and the donee suffer a recovery, this is no bar of the rent, but it remains a collateral charge on the land; for since the tenant in tail took the land subject to that charge, the recoveror who claims under him can have no better estate. So if there be a limitation of an use upon condition, and the *cestui que use* suffer a recovery, this does not destroy the condition; for the estate of him who suffered the recovery being charged with it, he could not make his purchaser a better title than he himself had^o.

For the same reason, if tenant in tail grant a rent-charge, and then suffer a common recovery, yet the land is still chargeable with the rent in the hands of the recoveror; for though the statute *de donis* render such charges void as to the issue, where the estate-tail descends according to the form of the gift; yet that statute makes no such provision for any person who claims the land by another title than the gift in tail; and therefore the recoveror, who is not comprised in the first donation, must take it subject to the charges which lay on it when he purchased it^p.

A distinction has, however, been adopted between a grant of a rent-charge in tail, with a remainder over of the same rent-charge in fee, and a grant of a rent-charge in tail,

^m 2 Lev. 26; 1 Mod. 108;
Benson and Baron v. Hud-
son, 3 Keb. 274, 287, 292.

ⁿ 1 Mod. 110; 2 Lev. 30.

^o Cro. Eliz. 792; *White*
v. West, 2 Lev. 30; 1 Mod.
109; *Pigot*, 139.

^p 1 Mod. 109.

RECOVERIES.

Executory devise.

without any subsequent limitation of it in fee. In the first case, the tenant in tail acquires an estate in fee-simple in the rent-charge by means of a common recovery; but in the second he only acquires a base fee, determinable on his decease and failure of the issue^a (1).

But though a recovery bars all contingent remainders expectant upon an estate-tail, it will not bar an executory devise expectant on such estate: as, if lands be devised to *A.* and his heirs, and if he die without issue, living *B.* then to *B.* and his heirs: if in this case, *A.* suffer a common recovery, and die without issue in the life of *B.* this recovery shall not bar the future interest of *B.* for *B.* by the devise had only a possibility, and no present interest and the recompense in value cannot go to those who were neither parties to the recovery nor had any interest in the land at the time of the recovery suffered; nor is there any danger of a perpetuity in this case, because here the future interest of *B.* must vest on a contingency which is to happen within the compass of a life in being^r (2).

So if lands be given to *J. S.* and his heirs, as long as *B.* has issue of his body, *J. S.* cannot, by recovery, bind the donor; but upon the death of *B.* without issue of his body, the lands shall revert to the donor, because the donor had no interest in the land, for there cannot be a fee upon a fee; and a common recovery against tenant in fee-simple shall never bind any collateral title or possibility, because

^a *Chaplin v. Chaplin*, 3 P. Wms. 229.

^r Cro. Jac. 591; Palm. 131; 2 Rol. Abr. 394; *Pell v. Brown*, Lev. 12.

(1) For the principles on which this distinction is founded, see Mr. Butler's note, Co. Lit. 298, a. n. (2), and *ante*, vol. i. p. 330.

(2) It was said, in this case, if the person to whom the executory devise is limited, come in as vouchee, in a common recovery, that his possibility is thereby given up, and his heir barred. *Vide* Fearn's Essay on Contingent Remainders, third edit. 307.

the recompense cannot go to those who had no interest in the land¹.

RECOVERIES.

So, if a mortgagee in fee suffers a recovery, this shall not bind the mortgagor's right of entry upon performance of the condition; but in these cases, if the donor or mortgagor had been parties to the recovery, then their right had been bound, not only on account of the recompense, but because they are estopped by the recovery to claim the land against the recoveror or his heirs, when they were called in before the judgment to defeat his title, but could not do it².

Nor will a common recovery bar any other contingent executory estate. Therefore, if one have an estate in fee, determinable on a limitation or condition: as, if lands are given to *A.* and to his heirs until *B.* pays him 100*l.* and then to remain to *B.* and his heirs; *A.* suffers a common recovery; this bars not *B.* but on payment of the money he shall have the land³. So if a writ of entry be brought against the mortgagee, and he suffers a common recovery, this bars not the mortgagor; but if the mortgagee vouch the mortgagor, it is good; but it is no bar unless he be vouched⁴.

Not contingent
executory
estates.

A common recovery suffered by tenant in tail bars all collateral conditions which take place on the determination of such estate-tail. Thus, where lands were devised to several persons successively in tail, with a proviso, and expressly upon condition, "that whenever it shall happen that the said estates shall descend or come to any of the persons herein before named, that he or they do and shall then change their surname, and take upon them and their heirs the name of *W.* only, and not otherwise;" and no devise over upon breach of the proviso. *A.* the first tenant in tail suffered a common recovery, in which he was vouched:

Collateral
conditions.

¹ Cro. Jac. 593; Fig. 129.

² Palm. 132; Brid. 3.

³ Palm. 135; Cro. Jac. 593.

⁴ 2 Rol. Rep. 222; 2 Cro. 592; 1 Keb. 30.

RECOVERIES.

A. never having taken upon him the surname of *W*, the next in remainder entered for breach of the proviso; but the whole court agreed, that this proviso being a condition collateral and subsequent, it was destroyed by the recovery¹.

Although a common recovery was first introduced for the purpose of barring entails, and is still principally used for the same purpose, yet as a recovery has the effect of vesting a new estate, in fee-simple, in the recoveror, it will, in many cases, be a bar to other estates and interests beside estates-tail.

Thus a common recovery will bar the wife of her dower if she join in it², or her jointure³.

Trust estates.

And a recovery will bar a trust as well as a legal estate.

Sir Francis North purchased certain lands in Essex from Richard Allington, who was *cestui que trust* in tail of them, with remainders over, and had suffered a common recovery; but there was no legal tenant to the *præcipe*, the freehold being in the trustees, who were not parties to the recovery; yet decreed that the remainders expectant on the estate-tail were well barred by this recovery^b.

But these recoveries operate only on the trust estate whereof they are suffered, and the equitable remainders expectant thereon, without affecting any legal estate; so that a legal remainder cannot be barred by an equitable recovery^c.

Therefore, where a person having an equitable estate for the life of his father, and a legal estate-tail, suffered a recovery; it was the opinion of the court, that his estate

¹ *Gulliver v. Shuckburgh*
Ashby, 4 Burr. 1929; and
see *Driver v. Edgar*, Cowp.
379.

² Stat. West. 2; 2 Inst.
347; 2 Co. 74, a; 10 Ibid.
43, a.

³ *Inclendon v. Northcote*,
3 Atk. 430.

^b *North v. Champenown*,
2 Cha. Ca. 63, 78; S. C.
1 Vern. 13; 1 P. Wms. 91;
Cru. Recov. 271.

^c *Robinson v. Cumming*,
Cas. temp. Talb. 167; 1 Atk.
473.

for life being an equitable estate, and his estate-tail a legal estate, he was not enabled to suffer either a perfect legal or perfect equitable recovery, and therefore the recovery operated nothing ^d.

In recoveries of this kind, there must be an equitable tenant to the *precipe*, that is, the trust estate must be conveyed to a third person, against whom the writ must be brought, in the same manner as in recoveries of legal estates ^e.

But if there be a *cestui que trust* for life before the *cestui que trust* in tail, so that in case the legal estate had been conveyed according to the trusts, the tenant in tail could not bar the estate-tail by common recovery, there the *cestui que trust* in tail cannot bar his estate-tail by a recovery ^f.

Where an estate-tail is conveyed or devised to trustees and their heirs, upon trust to pay debts, and after payment of such debts, then in trust for *A. B.* in tail to convey such parts of the estate as shall remain unsold; in either of those cases, *A. B.* has a trust estate in the surplus, vested in him immediately upon the execution of the deed, or the death of the testator, and may suffer an equitable recovery of such estate ^g.

A common recovery will bar a right to a writ of error. Writ of error.
If, therefore, tenant in tail levy an erroneous fine, and the conusee suffers a common recovery, in which the tenant in tail comes in as a vouchee, the recovery will bar the tenant in tail and his issue of a writ of error to reverse the fine, and the recoveror may plead the recovery in bar of the writ of error; for since the tenant in tail, by coming in as vouchee, is barred of all right or title which he can have to the land, the writ of error, which is but a means

^d *Salvin v. Thornton*, cited in Br. Ch. Ca. 73.

^e Cru. Recov. 273.

^f 2 Ch. Ca. 64.

^g See *Earl of Bath's case*,

1 Collec. Jur. 214.

RECOVERIES.

Powers.

to restore him to his right, must likewise be barred, since the recovery has left him no right to be restored to^a.

A recovery will bar a power, whether appendant or in gross, if suffered of the land to which the power relates; for the land being supposed to be recovered by a right paramount to the title from which the power is derived, it over-reaches it¹. If, therefore, one has an estate for life, with power to make a jointure, and suffer a common recovery, his power is extinguished; for the estate to which the power was annexed is gone and forfeited by the recovery^k.

But powers which are collateral to the land, are not barred by a common recovery, any more than they are by fines, they being protected by parity of reason^l.

So one made a gift in tail, determinable on the donee's nonpayment of 100*l.* remainder to *B.* in tail: tenant in tail, before the day of payment, suffers a common recovery, and after pays not the money; yet, because he was tenant in tail when he suffered the recovery, all is barred^m.

Terms for years.

A term subsequent to the estate-tail, as, to arise after failure of the issue male, is barrable by common recovery; as if an estate be limited to one for life, with remainder to his first and other sons in tail, but if a man make a lease for 100 years to *B.* to commence after the lessor's death without issue male, in trust for payment of daughters portions, and afterwards by another deed, limits the lands to the use of himself for life, remainder to his first and other sons in tail, a common recovery will not bar the term for 100 years; for the first term was prece-

^a *Barton's case*, Moor, 365; Cro. Eliz. 388; Poph. 100. ^k 1 Vent. 225, 226; 1 Mod. 111; 1 Keb. 31; 3 Ib. 291.

¹ *King v. Melling*, 2 Lev. 58; 1 Vent. 225; *Saville v. Blackett*, 1 P. Wms. 777. ^l Co. Lit. 237, a. ^m 1 Mod. 111; 1 Keb. 31; 3 Ib. 291.

dent, and the estate created, by different deeds, the difference is, therefore, when the term is precedent to the entail, and when subsequent^a.

RECOVERIES.

A further effect of a common recovery is, if suffered by a tenant for life, without the concurrence of those in remainder or reversion, to work a forfeiture of his estate for life, in like manner as if he had levied a fine or made a feoffment in fee, and for the same reason^b; viz. because it is a trust incident to the estate of the tenant for life, to answer the *præcipes* of strangers, and to defend the inheritance as well as his own freehold. But if he suffers a recovery to be had against him by default, or vouches a stranger, he admits the reversion to be in such stranger, or the demandant, which is a denial of his tenure of the reversioner, and a forfeiture of his estate^c.

Forfeiture.

But if the tenant for life has also an estate in remainder, a recovery suffered by him will not incur a forfeiture, because, in this case, the former reason does not hold^d. Thus, where tenant for life, remainder to the first and other sons in tail, remainder to the heirs of his body, suffered a recovery of his estate, it was held to be no forfeiture^e; for though forfeiture is a proper punishment for a bare tenant for life who takes upon himself to do an act inconsistent with the nature of his tenure, and which before the statute of 14 Eliz. would have displaced the remainders, yet the law will not punish a man for doing that which is not inconsistent with the nature of his estate, and which may have a legal operation; and such this case, for the tenant stands in two several characters, i. e. that of tenant for life, and that of remainder-man in tail after the limitation to his first and other sons; and having a remainder in tail, he has a right to bar, and has a legal

^a See *Benson's case*, 2 Lev. 26; but better reported, 1 Mod. 108.

^b See *Pelham's case*, 1 Co. 15.

^c Co. Lit. 35, b. 252, a.

^d *Doe v. Lord Mulgrave*, 5 Durnf. & East, 302.

^e *Smith v. Clifford*, 1 Ib. 738.

RECOVERIES.

subject for the recovery to operate upon; the tenant for life is therefore to be considered as vouched, and to enter into warranty, not in respect of his estate for life, but of his remainder in tail; and the recompense in value is supposed to go to those who would have been entitled to such estate-tail, and passes over the estate-tail of the first and other sons, and as they have no recompense, their estate is not displaced, or in any manner affected by the recovery.

Neither, it should seem, will a recovery, suffered by a copyholder in the lord's court, be a forfeiture of his copyhold; for though it is said by Lord Coke¹, that such recovery would be a forfeiture, yet it has been expressly determined to be otherwise since his lordship's time²: for when tenant for life of a copyhold suffers a recovery as tenant in fee, the freehold is not affected, for that is in the lord; and it being in a court baron, where there is no estoppel, and the lord being a party, it is not to be resembled to a recovery by a free tenant.

Alters descent.

A recovery, as we have before seen of a fine, will also, in some cases, alter the course of descent; as, if tenant in tail, as purchaser under a marriage-settlement made by his ancestor, *ex parte materna*, with reversion in fee by descent *ex parte materna*, suffer a common recovery to the use of himself in fee, the descent will be changed, and it will thenceforth descend to his heirs *ex parte paterna*³; because, by the recovery, the estate-tail is converted into an estate in fee, and he having taken the estate-tail as a purchaser, he of course takes the fee in the same manner, and it will therefore descend to his heirs general. But, where the estate-tail is taken by descent, a recovery will not alter the channel in which it would have gone otherwise; for he takes the first fee, subject to the qualities

¹ Copyh. s. 357.

² *Keen v. Kirby*, 1 Mod.

199; 2 Ib. 32.

³ *Martin* c. d. *Tregonwell*

v. *Strachan*, 1 Stra. 1179;

1 Wils. 66; 5 Durnf. & East,

107, n.; 4 Br. P. C. 486.

which before attended it^a; and whether the estate be freehold or copyhold it will make no difference; for *per curiam*, it would lead to perplexity, if different rules were applied to different sorts of estates⁷.

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And as a recovery suffered of an estate-tail taken by descent, will not alter the course of descent, so consequently neither will it when suffered of an estate in fee-simple taken in the same manner².

A recovery suffered of land by tenant in tail will likewise operate as a revocation of a devise previously made of such land^a; because, by the recovery, the estate is changed; and no longer the same; for by the recovery the tenant in tail acquires an estate in fee-simple, which fee was never devised; and this case is stronger than the case of a feoffment^b: and yet, even there, "if a man devise lands, and afterwards makes a feoffment of them, it will be a revocation of the devise, and that though the feoffment be to the use of himself and his heirs, which is the old and same use of which he was before seised."

Revokes a devise.

But where the recovery is for a particular purpose, or for a partial estate only, as to create an estate for years, or for life, out of the lands devised, it will operate only as a revocation of the will to the extent of such estates^c.

A further effect of a common recovery suffered by a tenant in tail is, to let in upon the fee-simple and render valid all preceding encumbrances and acts of ownership which he had previously exercised over the estate-tail; for a man shall not be suffered to defeat his own acts, but rather shall be presumed to have intended by the recovery

Lets in charges.

^a *Roe v. Baldwin*, 5 Durnf. & E. 104.

⁷ *Ibid.*

² *Abbot v. Burton*, 11 Mod. 181.

^a *Dister v. Dister*, Lev. 3, 108; *Marwood v. Turner*, 3

P. Wms. 163; *Darley v. Langworthy*, 3 Wils. 6; *Parsons v. Freeman*, 3 Atk. 744.

^b *Marwood v. Turner*, *ibid.* *supr.*

^c *Parsons v. Freeman*, 3 Atk. 744.

RECOVERIES.

to confirm them^d. If, therefore, tenant in tail make a lease not warranted by the statute 32 Henry 8, or acknowledges a judgment or recognizance, and afterwards suffers a recovery, it will operate as a confirmation of those charges which before were defeasible by the issue; for the recoveror acquires a fee-simple derived out of the estate-tail: and hence all such acts as bound the tenant in tail, will bind the recoveror, who cannot aver that the person against whom he recovered had but an estate-tail.

So, if tenant in tail make any conveyance or settlement of his estate-tail which is not binding upon his issue, and afterwards suffers a recovery, it will enure to confirm and make good such conveyance or settlement, even though suffered for a different and collateral purpose^e. Where, therefore, tenant in tail mortgaged for years, and afterwards suffered a recovery for settling a jointure on his wife, the recovery was held to operate as a confirmation of the mortgage^f. So where tenant in tail made a settlement on his marriage by lease and release only, and many years afterwards suffered a recovery, and declared the uses to be to a trustee, in trust to sell for the payment of debts, the court held, unanimously, that this recovery operated as a confirmation of the settlement, and would not authorize the trustee to sell, otherwise than as subject to the settlement^g.

But where tenant in tail, with the reversion in fee to himself, creates charges upon the estate, and his son, on whom the estate-tail or reversion in fee descends, suffers a recovery, upon the death of his father, this will not operate so as to let the reversion into possession, and make it liable to the debts of the father, as a fine levied in such case

^d 1 Co. 62, a; 2 Ib. 52, b;
1 Wils. Rep. 277.

^e *Goodright* e. d. *Tyrrell*
v. *Mead*, 3 Burr. 1703;
Cheney v. *Hull*, Amb. 526.

^f *Goddard* v. *Complin*, 1
Cha. Ca. 119.

^g *Goodright* v. *Mead*, 3
Burr. 1703.

would^a; because all reversions and remainders, expectant on the determination of the estate-tail, are barred and destroyed by the recovery. Where, therefore, a person is tenant in tail by descent, with the reversion in fee also by descent, he ought to bar his estate by a common recovery, and not by fine alone, which would subject the fee thus acquired to all encumbrances charged upon it by the ancestor.

^a See *ante*, 486.

END OF VOL. IV.

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